RECEIVED
NOV 25 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM, 1980

NO. 80-5778

JOSEPH WILSON, JR.

PETITIONER

Vs.

STATE OF GEORGIA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF GEORGIA

BRUCE S. HARVEY
HARVEY AND BROWN
P.O. BOX 906
CLAYTON, GEORGIA 30525
PHONE: (404) 782-4575

COUNSEL FOR PETITIONER

I N D E X

	Page
OPINION BELOW.	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED. . .	2-6
STATEMENT OF THE CASE.	6-8
REASONS FOR GRANTING THE WRIT.	8

1. Petitioner's conviction and sentence to death for murder and for possession of a deadly weapon during commission of a felony constitutes double jeopardy in violation of the Fifth Amendment to the United States Constitution..... 8-15

2. Petitioner's conviction and sentence to death for murder while in the commission of kidnapping with bodily harm, where the asportation is a part of the commission of the crime of murder and the only bodily harm is the murder itself, violates due process of law as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution. 15-17

3. Petitioner was denied due process and protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutors continual comments upon Petitioner's failure to produce certain evidence..... 17,18

4. Trial Court's instructions improperly place the burden of proof on the issue of intent upon the Petitioner rather than the State in violation of the Due Process Clause of the Fourteenth Amendment. 18-21

5. The Georgia Supreme Court erred in making a determination of immaterality under Brady (infra) as to a conviction record of one of the State's witnesses, thereby denying Petitioner of his due process rights of equal protection, of his right to a fair and impartial trial, and his right to confront witnesses 21-23

APPENDIX:

1. Opinion and Judgment of the Supreme Court of Georgia . . . . . .App. A

2. Order Extending Time to File Petition for Writ of Certiorari . . . . . .App. B

CITATIONS

Page

Atkins v. Hopper
239 Ga. 330, 216 S.E. 2d 89 (1975). 13

Bailey v. State,
146 Ga. App. 774, 247 S.E. 2d 588(1978) 15,16

Blockburger v. United States
284 U.S. 299(1932). 9,12

Brady v. Maryland
373 U.S. 83(1963) 7,22

Brown v. Ohio
432 U.S. 161 (1977) 9,13,14

Brown v. State
132 Ga. App. 399,208 S.E. 2d 183(1974). 15

Brown v. State
150 Ga. App. 831, 258 S.E. 2d 641(1979) 17

Chandle v. State
230 Ga. 574, 198 S.E. 2d 289(1973). 19

Craighead v. State
126 Ga. App. 300, 190 S.E. 2d 606(1973) 15

Delk v. State
135 Ga. 312, 69 S.E. 541(1910). 19

Gannaway v. State
142 Ga. App. 87, 235 S.E. 2d 392(1977). 17

Giles v. Maryland
386 U.S. 74. 22

Godfrey v. Georgia
446 U.S. ___ 100 S.Ct. 1759(1980) 16,17

Gore v. United States
357 U.S. 386(1958) 13

Gregg v. Georgia
428 U.S. 153(1976) 16,17

Griffin v. California
380 U.S. 609(1965) 17

Guerrero v. Beto
384 F 2d 886 (5th Cir.1968). 22

Harris v. Oklahoma
433 U.S. 682(1977) 14

Hill v. State
244 Ga. 86, 259 S.E. 2d 41(1979) 21

In Re Ferguson
489 F 2d 1234(9th Cir.1971) 22

CITATIONS

	Page
Jackson v. State 143 Ga. App. 406,238 S.E. 2d 752(1977).	11
Knox v. State 112 Ga. 373,37 S.E. 419(1900)	18
Mullaney v. Wilbur 421 U.S. 684	20
Moon v. State 68 Ga. 687(1882).	19
Oglesby v. State 243 Ga. 690,256 S.E. 2d 371(1979).	12
Ogletree v. State 209 Ga. 413, 73 S.E. 73 S.E. 2d 201(1952). . . .	19
Patterson v. New York 432 U.S. 197	20
Patterson v. State 239 Ga. 409, 238 S.E. 2d 2(1977)	19,20
Potts v. State 241 Ga. 67,243 S.E. 2d 510(1978)	11,12
Powell v. Wiman 287 F 2d 27595th Cir.1961)	22
Pryor v. State 238 Ga. 698,234 S.E. 2d 918(1977).	11
Roberts v. State 228 Ga. 298,185 S.E. 2d 385(1971).	10
Sandstrom v. Montana 441 U.S. ___ 19 S.Ct. ___(1979)	20,21
Shirley v. State 245 Ga. 616,266 S.E. 2d 218(1980).	17
Simpson v. United States 435 U.S. 682(1977)	13,14
Spain v. State 243 Ga. 15, 252 S.E. 2d 436(1979).	20
Spence v. State 233 Ga. 527 212 S.E. 2d 357(1975).	11
State v. Estevez 232 Ga. 316, 206 S.E. 2d 475(1974)	11
Stephens v. Hopper 241 Ga. 596,247 S.E. 2d 92(1978)	12

CITATIONS

	Page
Thomas v. State 240 Ga. 454, 241 S.e. 2d 204(1976).	20
U.S. v. Keogh 391 F 2d 138(2nd Cir.1968)	22
Whitehead v. State 144 Ga.App. 836,242 S.E. 2d 754(1978)	11
William v. Dutton 400 F 2d 797(5th Cir.1968).	22
Woods v. State 233 Ga. 495,212 S.E. 2d 322(1975)	13

IN THE SUPREME COURT FOR THE UNITED STATES
OCTOBER TERM, 1980

NO._____

JOSEPH WILSON, JR.

PETITIONER

Vs.

STATE OF GEORGIA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

The Petitioner, Joseph Wilson, Jr., respectively prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Georgia entered in this proceeding on June 10, 1980.

OPINION BELOW

The opinion of the Supreme Court of Georgia is published at Wilson v. State, 243 Ga. 62, _____S.E. 2d_____(1980), and a copy is attached hereto as Appendix A.

JURISDICTION

The judgement of the Supreme Court of Georgia was entered on June 10, 1980, affirming petitioner's conviction of murder, kidnapping with bodily injury, possession of a firearm in the commission of a crime and his sentence of death. A timely petition for rehearing was denied on June 24, 1980. An Order extending time to file petition for writ of certiorari was granted September 10, 1980, a copy of which is attached as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Does Petitioner's conviction and sentence to death for murder and for possession of a deadly weapon during commission of a felony constitute double jeopardy in violation of the Fifth Amendment to the United States Constitution?

Does Petitioner's conviction and sentence to death for murder while in the commission of kidnapping with bodily harm, where the asportation is a part of the commission of the crime of murder and the only bodily harm is the murder itself, violate due process of law as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution?

Was petitioner denied due process and protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutors continual comments upon Petitioner's failure to produce certain evidence?

Did trial court's instructions to the jury improperly place the burden of proof on the issue of intent upon the Petitioner rather than the State in violation of the Due Process Clause of the Fourteenth Amendment?

Did the failure of the State to provide Petitioner with exculpatory material violate his rights to due process of law under the Fifth?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

The Constitutional and statutory provisions are as follows:

United States Constitution, Fifth Amendment

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Fourteenth Amendment:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person without its jurisdiction the equal protection of the laws.

Georgia Constitution, 2-115 (Art. I, Sec. I) Par. XV.

No person shall be put in jeopardy of life or liberty more than once for the same offense, save on his, or her own motion for a new trial after conviction, or in case of mistrial.

Ga. Code Ann. 26-505

An accused may be convicted of a crime included in a crime charged in the indictment, information, or accusation. A crime is so included when:

(a) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged, or

(b) It differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpability suffices to establish its commission.

Ga. Code Ann. 26-506

(a) When the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if (1) one crime is included in the other, or (2) the crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct.

(b) If the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution except as provided in subsection (c).

(c) When two or more crimes are charged as required by subsection (b), the court in the interest of justice may order that one or more of such charges be tried separately.

Ga. Code Ann. 26-507

(a) A prosecution is barred if the accused was formerly prosecuted for the same crime, based upon the same material facts if such former prosecution
(1) resulted in either a conviction or an acquittal; or
(2) was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.
(b) A prosecution is barred if the accused was formerly prosecuted for a different crime, or for the same crime based upon different facts, if such former prosecution
(1) resulted in either a conviction or an acquittal, and the subsequent prosecution is for a crime of which the accused could have been convicted on the former prosecution; or was for a crime with which the accused should have been charged on the former prosecution (unless the court ordered a separate trial of such charge); or was for a crime which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the crime was not consummated when the former trial began; or
(2) was terminated improperly, and the subsequent prosecution is for a crime of which the accused could have been convicted if the former prosecution had not been terminated improperly.
(c) A prosecution is barred if the accused was formerly prosecuted in a District Court of the United States for a crime which is within the concurrent jurisdiction of this State if such former prosecution resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the crime was not consummated when the former trial began.
(d) A prosecution is not barred within the meaning of this section(1) if the former prosecution was before a court which lacked jurisdiction over the accused or the crime; or(2) if subsequent proceedings resulted in the invalidation, setting aside, reversing, or vacating of the conviction, unless the accused was thereby adjudged not guilty or unless there was a finding that the evidence did not authorize the verdict.
(e) Termination under any of the following circumstances is not improper:
(1) The accused consents to the termination or waives, by motion to dismiss or other affirmative action, his right to object to the termination.
(2) The trial court finds that the termination is necessary because(a) it is physically impossible to proceed with the trial; or(b) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to the defendant; or (c) the jury is unable to agree upon a verdict; or (d) false statements of a juror on voir dire prevent a fair trial.

Ga. Code Ann. 26-9908a

Any person who shall have on his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit, any crime against or involving the person of another, the unlawful entry into a building or vehicle or a theft from a building or theft of a vehicle and which crime is a felony shall be guilty of a felony and, upon conviction thereof, shall be punished by confinement and

labor in the penitentiary for a period of five years, such sentence to run consecutively to any other sentence which the person has received. Upon the second or subsequent conviction of a person under this section, such person shall be punished by confinement and labor in the penitentiary for a period of 10 years. Notwithstanding any other provision of law to the contrary, the sentence of any person imposed for violating the provisions of this section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof.
Notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense.

Ga. Code Ann. 26-1101(b)

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Ga. Code Ann. 26-1302

A person commits aggravated assault when he assaults (a) with intent to murder, to rape,or to rob, or (b) with a deadly weapon. A person convicted of aggravated assault shall be punished by imprisonment for not less than one nor more than 10 years. A person who knowingly commits aggravated assault upon a peace officer while such peace officer is engaged in or on account of the performance of his official duties shall upon conviction be punished by imprisonment for not less than five nor more than 20 years.

Ga. Code Ann. 26-1311(a)

(a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

Ga. Code Ann. 27-2534.1(b)(2)

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

Ga. Code Ann. 38-1804

A witness may be impeached by evidence as to his general bad character. The impeaching witness should be first asked as to his knowledge of the general character of the witness, and next as to what that character is, and lastly he may be asked if, from that character, he would believe him on his oath. The witness may be sustained by similar proof of character. The particular transactions, or the opinions of single individuals, shall not be inquired of on either side, except upon cross-examination in seeking for the extent and foundation of the witness' knowledge.

STATEMENT OF THE CASE

Appellant was tried and convicted of murder and kidnapping, and possession of deadly weapon in the commission of a felony, in Forsyth County, Georgia on August 16, 1979, (T 1249-1253 and 1275-1276), and was thereafter sentenced to death. The statutory basis for imposition of the death penalty, as found by the jury, was murder committed while in the commission of "kidnapping the person of George A. Knox, resulting in bodily injuries to said person". Ga. Code Ann. 27-2534.1(b)(2), (R32) (T 1317).

Appellant was denied a motion for retrial before the Superior Court of Forsyth County on October 29, 1979. and thereafter appealed to the Georgia Supreme Court.

The Georgia Supreme Court affirmed the conviction on June 10, 1980, and denied a motion for a rehearing on June 24, 1980.

The evidence presented at trial in both the guilt or innocence stage and in the death penalty stage tended to show that Appellant arrived at the home of Patty Johnson (T 637) with a shotgun on the evening of February 23, 1979. Thereafter he made statements to the deceased in the presence of three witnesses (one being Patty Johnson) to the effect "you set me up" or "you put the heat on me". (T 641,766-768,810). Two of the witnesses then left. (T 641,769,811), leaving Patty Johnson, the deceased and Appellant, (T 641,769,811).

Appellant then instructed the deceased to go with him and evidently walked him out of the house at gun point,(T 642,769). Later that night Appellant told Patty Johnson in a telephone

conversation that the Deceased had been "taken care of", and to get rid of the deceased's jacket. (T 648-649).

On the morning of February 24, 1979, Frances Lane of Forsyth County found the deceased's corpse and reported this fact to the Forsyth County Sheriff's Office. (T 577,587-588).

In the ensuing autopsy it was determined that the deceased had been killed by a twelve gauge shotgun, and that he probably had been alive the previous day. (T 428-429) (S,4,A,B and C)(T 431,728-729).

Through examination of the deceased's license and payroll checks his place of employment was determined. (T 428). The follow-up investigation revealed that the deceased had last been seen alive at Patty Johnson's home on the night of February 23, 1979. (T 435-443), and that he had left that night with the Appellant (T 443-444).

Appellant was subsequently arraigned and appointed counsel. Prior to trial, the defendant's attornies filed a twelve paragraph "Motion for Discovery" stating that it was made under authority of Brady v. Maryland, 373 U.S. 83 (83 SE 1194, 10 LE 2d 215) (1963) and its progeny , and under authority of Code Ann. Sections 38-801, 38-802. The motion specifically called for statements of Patty Johnson and described some items generally (e.g. memoranda or reports of law enforcement officers from Forsyth, Cobb, and Gwinnett Counties regarding the defendant and the case). The motion called for the production of these items at all pretrial hearings and at trial and asked that defense counsel be permitted to examine the documents or, if examination be denied, that the Court conduct an in camera inspection of such documents and that counsel be permitted to examine exculpatory materials found by the court in the in camera inspection.

On June 13, 1969, the defendant filed a motion to produce under Code Ann. 38-801, 38-802, detailing eight categories. This motion requested delivery of these itmes on the following day, June 14, 1979. At the June 14, 1979 hearing the trial judge

ordered the State to submit some of the requested material to the defense, and further ordered that the State submit their files to the court for in camera inspection.

At this hearing the defense specifically requested that the Court make a record of all the material reviewed so that any material not viewed by the defense could be preserved for appellate review. The State acquiesced to this request (Hearing Transcript, June 14, 1979, pp 31-32). This request was remade by defense on several occasions, the final time being at time of trial. (T 13).

Subsequent to the trial while on appeal to the Georgia Supreme Court the failure of the trial court to keep such a record of inspected material necessitated a de novo review by the Georgia Supreme Court of all material submitted for inspection. As a result of this review the Georgia Supreme Court did note "possible" exculpatory material, that being a conviction record of one of the State's witnesses (George Burns on four counts of dangerous drugs and bad checks). Parenthetically, this material had not been examined by the trial judge prior to trial. The Georgia Supreme Court concluded that such evidence, although possibly exculpatory, was not material either to the Appellant's guilt or punishment. (Georgia Supreme Court Case Number 35987, opinion dated June 10, 1980).

REASONS FOR GRANTING THE WRIT

1. Petitioner's conviction and sentence to death for murder and for possession of a deadly weapon during commission of a felony constitutes double jeopardy in violation of the Fifth Amendment to the United States Constitution.

Georgia Code Ann. Sections 26-505, 26-506 and 26-507 codify and expand the double jeopardy protection afforded criminal defendants by the United States and Georgia Constitutions. U.S. Const., Amend. V; Ga. Const., Art. I, Sec. I, Par. XV.

The notion that a person shall not be twice placed in jeopardy for the same offense includes two separate prohibitions: (1) An individual shall not be subjected to successive prosecutions for the same offense and (2) an individual shall not receive two punishments for the same offense.

The double jeopardy prohibition of multiple convictions is an aspect of the substantive criminal law. This substantive aspect has been described as "a limitation upon judicial interpretation of the substantive criminal law" which allows state legislatures freedom to define crimes and fix punishments, but restricts the courts from imposing more than one punishment for each offense. See, Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221 (1977).

The attempt to define whether a particular defendant is being punished twice for the "same offense" has occupied a great deal of judicial time. As a starting point, it has long been recognized that "separate statutory crimes need not be identical...in order to be the same within the meaning of the constitutional prohibition". Brown v. Ohio, supra, at 164.

Various types of tests have been developed to answer the question of whether the defendant is being twice punished for the same offense. The majority of courts follow the so called "required evidence" test defined by this court in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932) as follows:

> "...where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."
> 284 U.S. 299 at 304

Georgia's rule against multiple punishments is stated in Ga. Code Ann 26-506(a) which provides, as a general rule, that where the defendants conduct establishes the violation of more than one

statute he may be prosecuted for each crime. The statute also provides, however, that a defendant cannot be convicted of both (1) a greater and lesser included offense or (2) a general prohibition and a specific prohibition of the same conduct. Reference must then be made to Ga. Code Ann 26-505 to determine what a lesser included offense is.[1]

In the instant case, Petitioner was indicted, tried and convicted of Possession of a Deadly Weapon During Commission of a Felony. Ga. Code Ann. 26-9908a.[2] The instant case raises the question of whether convictions for both 26-9908(a) and the underlying felony can stand in light of the constitutional and Georgia Double Jeopardy provisions mentioned above.

The Georgia Supreme Court first raised this question in Roberts v. State, 228 Ga. 298, 185 S.E. 2d 385(1971), in which the defendant was convicted of armed robbery as well as 26-9908a. The latter conviction was based on possession of the gun which was used to commit the armed robbery. The court found the 26-9908a offense to be a lesser included offense of armed robbery, and therefore 26-506(a) barred such double conviction.

---

1 Code Ann.26-505 provides that a crime is included when: "(a) It is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the crime charged."

2 Code Ann. 26-9908a provides as follows: Any person who shall have on his person a firearm or a knife having a blade of three or more inches in length during the commission of, or the attempt to commit, any crime against or involving the person of another, the unlawful entry into a building or vehicle or a theft from a building or theft of a vehicle and which crime is a felony shall be guilty of a felony and, upon conviction thereof, shall be punished by confinement and labor in the penitentiary for a period of five years, such sentence to run consecutively to any other sentence which the person has received. Upon the second or subsequent conviction of a person under this section, such person shall be punished by confinement and labor in the penitentiary for a period of 10 years. Notwithstanding any other provision of law to the contrary, the sentence of any person imposed for violating the provisions of this section a second or subsequent time shall not be suspended by the court and probationary sentence imposed in lieu thereof. Notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense.

In Spence v. State, 233 Ga. 527,212 S.E. 2d 357(1975). The same court held that a similar rule would apply in the case of a murder committed with a firearm, but the issue was not squarely presented because the 26-9908a conviction had already been vacated after the verdict was rendered.

While the court did not explain itself fully in Roberts or Spence, it is apparent that it was taking a "same evidence" approach to the question of multiple convictions: There cannot be two convictions based on the same trial evidence.[3] See also, State v. Estevez, 232 Ga. 316, 206 S.E. 2d 475(1974); Whitehead v. State, 144 Ga. App. 836, 242 S.E. 2d 754(1978); Jackson v. State, 143 ga. App. 406, 238 S.E. 2d 752 (1977).

However, the most recent decisions of the Georgia Supreme Court concerning the interpretation of 26-506(a) indicate that this approach has been discarded in favor of a "distinct elements" approach. The apogee of the Roberts and Spence actual evidence approach was reached in Pryor v. State, 238 Ga. 698, 234 S.E. 2d 918(1977). In Pryor, the court was faced with a defendant convicted of both aggravated kidnapping and murder. The evidence showed that the defendant had shot the victim three times, with the third shot being fatal. While affirming the convictions for both offenses, the court hypothesized that if there had only been one shot, the aggravated kidnapping would be included within the murder "on the facts".

Faced with exactly this hypothesized situation in Potts v. State, 241 Ga. 67, 243 S.E. 2d 510(1978), the Georgia Supreme

---

[3] Apparently in response to Roberts and Spence, the Georgia General Assembly, in 1976, amended 26-9908a to provide that "notwithstanding any prior court decision to the contrary, any crime committed in violation of this section shall be considered a separate offense".

Court affirmed both convictions by adopting the Blockburger test and concluded that "[no] matter what may have been put into evidence, the key consideration is whether one of the crimes was established by proof of the same or less than all the facts required to establish the commission of the crime charged." Accord, Stephens v. Hopper, 241 Ga. 596, 247 S.E. 2d 92 (1978); Oglesby v. State, 243 Ga. 690, 256 S.E. 2d 371(1979).

Under this analysis, a defendant can be convicted of two offenses in the same transaction if, and only if, each of the offenses requires the state to prove an element that is not required to be proven for conviction of the other. Conversely, the defendant cannot be convicted of both crimes if the proof of one requires all the elements of the other plus other elements.

It is submitted that the Georgia Supreme Court's approach to this problem, with specific reference to Code Ann. 26-9908a, is faulty in the following respect. The Georgia Supreme Court, in finding that the 26-9908a conviction was the lesser included offense was obviously misled by the fact that the sentence for 9908a is less than that for most of the other underlying felonies. In point of fact, 26-9908a is the greater offense in this situation in that all the elements of the underlying felony must be proven in every 26-9908a prosecution plus the additional element of possession of the forbidden firearm. Under the Potts analysis, the underlying felony may change from case to case, but a 26-9908a offense cannot be proven without all the elements of some felony.

For purposes of the double conviction issue, 26-9908a is a perfect analogue to the felony/murder provisions of the Georgia Code. Code Ann 26-1101(b).[4] While any felony can serve

---

[4] Code Ann. 26-1101(b) provides: A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

as the underlying predicate of a felony-murder conviction, in any particular case the proof of felony/murder will necessarily require the proof of all elements of the underlying felony. The Supreme Court of Georgia has recognized this in repeatedly vacating the conviction for the underlying felony where the Defendant has also been convicted of felony-murder. See, e.g. Atkins v. Hopper, 234 Ga. 330, 216 S.E. 2d 89(1975); Woods v. State, 233 GA. 495, 212 s.E. 2d 322(1975).

Alternatively, under the "same evidence' test, the Double Jeopardy Clause of the United States Constitution would forbid conviction of both 26-9908a and the underlying felony. The Georgia Courts have not even referred to the applicability of the Clause in this situation. That clause has long beeen held applicable in situations where there have been convictions under two separate statues which,for constitional purposes are the "same offense".

Concededly, this Court has looked to legislative intent as an important factor in determining the validity of double convictions. Brown v. Ohio, supra; Gore v. United States, 357, U.S. 386, 78 S. Ct. 1280(1958). However, this "legislative deference approach" cannot be allowed to permit the legislature to define by itself the contours of the Double Jeopardy Clause of the United States Constitution. Absolute deference could obviously lead to absurd results. See, Schwartz, Multiple Prosecutions for the "same offense": Michigan Grapples with the Definitional Problem, 25 Wayne L. Rev. 825(1979).

In Simpson v. United States, 935 U.S. 682, 97 S. Ct. 2912 (1977), the Court wrote:

> "Cases in which the government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy...Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissable, it is necessary, following our practice of avoiding constitional decisions where possible, to determine whether Congress intended to subject the defendant to multiple penalties..."

This passage mandates a two-step analysis: First, did the legislative body intend for the defendant to be liable for double punishment? It is clear from the 1976 amendment to 26-9908a that the Georgia General Assembly did so intend. Second, however, assuming a legislative intention to twice punish, does the constitution itself bar double conviction? In Simpson this Court was able to avoid the second step because of a perceived legislative intent not to punish twice. In the instant 26-9908a murder prosecution in Georgia, this cannot be avoided because of the clear legislative intent.

Brown v. Ohio, supra, indicated that the content of the Double Jeopardy Clause is itself the "distinct elements" test. Thus, in Brown, the Court held there could not be a conviction of both theft and joy riding because joy-riding had no element, under Ohio law, which would not have to be proven in a theft case. Similarly, in Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912 (1977), the Court held that Double Jeopardy prohibited the later prosecution for a felony after an earlier conviction of felony/murder based on that felony.

As stated above, the structure of 26-9908(a) is identical to that of felony/murder. If the Double Jeopardy Clause prohibits conviction of both the felony and the felony/murder, it must likewise prohibit conviction of both the felony and 26-9908a. Harris stands for the proposition that the Double Jeopardy Clause prohibits double conviction where the legislative body has defined an offense as consisting of the commission of one of a class of offenses plus an additional element. Section 26-9908a does precisely that. It is defined as the commission of one of a particular group of felonies plus the possession of a firearm or knife.

Finally, refusal to permit double conviction in these situations does not emasculate legislative intent. If the legislative intent is to punish certain felonies more severely when accompanied by certain types of weapons, it could easily provide for sentence enhancement by way of amendment to the

particular felony statutes involved or the passage of a general statute providing for automatic increase of sentence for any who are convicted of certain felonies while in possession of a firearm. In fact, sch a result could be reached by proper judicial interpretation of 26-9908a. See, Schwartz, supra, at pp. 853-58. It should be noted that the Georgia Legislature has already taken this course in several instances. See, e.g., Ga. Code Ann 26-1302(an aggravated assault made knowingly on a law enforcement official is punished more severly than other aggravated assaults).

2. Petitioner's conviction and sentence to death for murder while in the commission of kidnapping with bodily harm, where the asportation is a part of the commission of the crime of murder and the only bodily harm is the murder itself, violates due process of law as guaranteed by the Eight and Fourteenth Amendments to the United States Constitution.

Ga. Code Ann. 26-1311(a) provides:

> "A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will".

The Georgia view of asportation is "any unlawful asportation, however slight, is sufficient to show the 'taking' element". Craighead v. State, 126 Ga. App. 300, 190 S.E. 2d 606 (1973); Brown v. State, 132 Ga. App. 399, 208 S.E. 2d 183 (1974); Bailey v. State, 146 Ga. App. 774, 247 S.E. 2d 588(1978).

Further, Georgia refuses to adhere to the "merger" concept - that movements incident to the commission of another felony which do not substantially increase the risk of harm over and above the risk necessarily present in the felony, did not constitute the separate crime of kidnapping. See, Bailey v. State, supra, at 775-6 and citations therein.

Under this view, any murder becomes a capital murder if the victim is moved at all. Should the victim be ordered to move 5 feet over and turn around, then be shot and killed, this would justify a sentence of death under Ga. Code Ann 27-2534.1 (b)(2). What guidelines or standards are present to avoid the arbitary and capricious infliction of the death penalty any time the victim is moved at all? The language and interpretation of the statute is so broad as to allow capital punishment in any murder case. Gregg v. Georgia, 428 U.S. 153(1976).

Nothing in this section, and specifically with reference to kidnapping with bodily harm, channels the sentencer's discretion by "clear and objective standards" that provide "specific and detailed guidance". See, Godfrey v. Georgia, 446 U.S.____, 100 S. Ct. 1759(1980). As was said in Godfrey, supra, "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not". Thus, the Georgia courts have adopted so ambiguous a construction of kidnapping with bodily harm in death cases that the realm of cases that is included is impermissibly large, leaving undue discretion to the sentencer and creating intolerable dangers of arbitariness and caprice.

What may be a defensible legal position in non-capital felony cases; becomes indefensible when applied to capital felony cases. In fact, the issue has been skirted in both Brown, supra; and Bailey, supra. In Bailey the Court refused to adopt the merger concept, and found no merit in the argument advanced by appellant that kidnapping was incidental to an escape. 146 Ga. App. at 779.

The evidence in the instant case clearly demonstrates that any kidnapping present here was in fact incidental to the commission of the crime of murder. There is no question of fact in that regard. Where movement is incidental to a murder there is always the presence of this aggravating circumstance.

In sum, the imposition of a death sentence on Petitioner for the crime of murder while in the course of the commission of kidnapping with bodily harm, where the asportation was incidental to the murder and the only harm was to the deceased, violates the standards of due process enunciated by this Court in Gregg, supra, and Godfrey v. Georgia, supra.

3. Petitioner was denied due process and protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution by the prosecutors continual comments upon Petitioner's failure to produce certain evidence.

Under Georgia law, although a prosecutor is prohibited from commenting on the defendants failure to testify (see, Griffin v. California, 380 U.S. 609(1965)); the prosecutor can argue to the jury inferences to be drawn from the defendant's failure to produce witnesses, who are competent to testify and allegedly would give evidence favorable to the defendant. See, Shirley v. State, 245 Ga. 616, 618, 266 S.E. 2d 218 (1980) and cits.

However a defendant is prohibited from drawing the same inferences from the failure of the prosecution to produce witnesses on its behalf. See, e.g. Brown v. State, 150 Ga. App. 831,832(2) 258 S.E. 2d 641(1979); Gannaway v. State, 142 Ga. App 87, 235 S.E. 2d 392(1977).

In the case sub judice the prosecutor argued as follows:

> "Now that (a man named Ron or Ronnie) has come up during the course of this trial several times. He hasn't testified in the case. But there is a defense investigator. If there was a Ronnie, don't you think he'd know where he was?...If there was such a person as a "Ronnie" they (defense) would have given you the name of that person. They would have found him".
> (T-1177)

> "Everyone of them there saw what happened. If then (sic) didn't, don't you know that the defense would have brought them in there?"
> (T-1176)

"Now I am going to ask you this, with their investigator and two attorneys. Couldn't they produce just one name of anybody else that fits "Joey" Wilson's description that drives a truck like that, a truck exactly like this truck?"

(T-1179)

Thus, throughout his final argument the prosecutor continually commented upon the defendants failure to produce evidence and witnesses in his behalf. Mere failure to call a witness who may have been around the defendant during the period prior to or subsequent to the crime; or even at the crime itself (Knox v. State, 112 Ga. 373(2), 37 S.E. 416), cannot raise a presumption against the accused that those persons would, if called, have testified unfavorably to him.

What is the basis under which Georgia law allows a prosecutor to argue inferences from the failure to testify, but not a defendant? A defendant need call no witnesses at all; and, the burden never shifts from the State to prove each and every element of a crime beyond a reasonable doubt. Surely a criminal defendant may draw inferences from the States failure to produce competent evidence at its disposal? This rule obviously flys in the face of justice as well as eroding the States burden of proof. No burden can be placed on the defendant during the trial of a criminal case. In this case, the witnesses were as available to the State as to the defendant, and the State could have called them to testify.

This procedural rule and the comments in this case deny Petitioner his rights to due process and equal protection of law.

4. Trial Court's instructions improperly place the burden of proof on the issue of intent upon the Petitioner rather than the State in violation of the Due Process Clause of the Fourteenth Amendment.

Ga. Code Ann. 26-1101 identifies two types of malice - the requisite mens rea for malice murder: express and implied. Of course, the intention to kill, like any other intention, is rarely capable of proof out of the mouth of the defendant or through specific prior acts connected to him or her. Therefore, Georgia provides in its murder statute and case authority that there can be a finding by the trier of fact of implied malice.

The exact meaning of this concept of "implied" malice is not clear, but apparently it is simply an intention to kill which is proven either by the act of killing itself, the surrounding circumstances or the absence of any provocation which would reduce an act otherwise murder to the level of voluntary manslaughter.

While the statute identifies two situations in which "implied" malice shall be found ("where no considerable provocation appears" and " abandoned and malignent heart"), the manner most frequently relied upon is the use of a deadly weapon. Georgia courts have traditionally held that when a defendant uses a deadly weapon to kill there is enough evidence to find the presence of malice. See, e.g. Chandle v. State, 230 Ga. 574 98 s.E. 2d 289 (1973); Ogletree v. State, 209 Ga. 413, 73 S.E. 2d 201(1952); Delk v. State, 135 Ga. 312, 69 S.E. 541(1910); Moon v. State, 68 Ga. 687 (1882). The method by which this is usually expressed is a two-step analysis which states that: (1) Upon a showing of the use of a deadly weapon the law presumes intent and (2) The law presumes every intentional homicide to be malicious. Patterson v. State, 239 Ga. 409, 238 S.E. 2d 2(1977).

In the case sub judice, the trial court charged the jury as follows:

> "If a person is killed by another, by an instrument, in the manner in which it was used was one likely to produce death, and at the time of the killing there were no circumstances such as to excite the fears of a reasonable man that he was in danger from the deceased, then the law will imply malice on the part of the defendant, and you would be authorized to find him guilty of murder, as charged in the indictment".
> (T-1195)

Further the Court charged

> "Intent may be inferred from proven circumstances, or, as I have said, by acts, conduct, demeanor and motive, or it may be presumed, when it is the natural and necessary consequences of the act for which the defendant is being prosecuted."
>
> (T-1198-9)

In Patterson, supra, the defendant claimed that presenting the jury with the instructions that "the law presumes the intent to kill" from the use of a deadly weapon and "the law presumes every intentional homicide to be malicious until the contrary is established" constituted an unconstitutional shift of the burden of proof as well as an unconstitutional set of presumptions for failure to establish a rational connection between proven and presumed fact.

While the Georgia Supreme Court recognized that malice is the mens rea element of murder and United State Supreme Court authority forbids the placing of the burden of proof on the defendant with regard to an element of the offense (Patterson v. New York, 432 U.S. 197; Mullaney v. Wilbur, 421 U.S. 684), the Georgia Court held that the above-quoted charges did not unconstitutionally place the burden of proof on the defendant. See also, Spain v. State, 243/15, 252 S.E. 2d 436(1979); Thomas v. State, 240/454, 241 S.E. 2d 204 (1976).

It must be noted that the charge in the case sub judice made no mention of the rebuttable nature of any presumption found in the law. In this respect, the instant case presents a stronger case than that found in Patterson, supra. Indeed, the decision of this Court in Sandstrom v. Montana, 441 U.S.____, 19 S.Ct____ (1979) overrules Patterson on its facts. The Montana Supreme Court, in Sandstrom, had reasoned exactly as the Georgia Supreme Court in Patterson, supra: That the effect of the instruction was to shift the burden of production of evidence only. In Sandstrom, this Court held that a trial court instruction almost identical to that in Patterson, to the effect that "the law presumes that a person intends the ordinary consequences of his voluntary acts", was unconstitutional in that it violated the Fourteenth Amendments requirements that the State prove every element of a criminal

offense beyond a reasonable doubt. Sandstrom held that regardless of what the Montana Supreme Court held was the actual legal effect of such a presumption (or, by analogy, The Georgia Supreme Court), a reasonable juror when told that "the law presumes" could have interpreted the instruction as creating either a conclusive presumption or at least a burden-shifting one and either such interpretation is unconstitutional in a criminal case. Under Sandstrom therefore, it seems clear that the malice instruction give sub judice is subject to the same constitutional infirmity.

Sandstrom mandates great caution in the instruction of juries with regard to the deadly weapon doctrine. Surely even greater caution is mandated in a death penalty case. Clearly, the jury must be instructed that any "presumption" or implication is not conclusive and can be rebutted. Cf. Hill v. State,244/86, 259 S.E. 2d 41 (1979).

The instruction in the instant case therefore violates Petitioner's rights under the Fourteenth Amendment to the United States Constitution.

5. The Georgia Supreme Court erred in making a determination of immaterality under Brady (infra) as to a conviction record of one of the State's witnesses, thereby denying Petitioner of his due process rights of equal protection, of his right to a fair and impartial trial, and his right to confront witnesses.

If the trial court had refused to allow the Petitioner's attorney to cross examine a State's witness as to his prior conviction on four counts of dangerous drugs, and bad check such refusal would clearly be error under Ga. Code Ann 38-1804. Yet, by the failure of the State to reveal this information before trial, the apparent decision of the trial court that it was not exculpatory or immaterial, and the subsequent decision by the

Georgia Supreme Court that this information was immaterial all effectively combines to deny the Petitioner his rights under this Georgia Code Section.

In Giles v. Maryland, 386 U.S. 66, 74, this Court stated that the State has the duty to disclose any favorable evidence which could be used at trial..." or in obtaining further evidence." (emphasis added).

In the instant case the Petitioner made an extensive, specific, pre-trial motion for discovery, under the authority of Brady v. Maryland, 373 U.S. 83 (1963),and also requested an in camera inspection of any and all documents by the trial court, and further requested that a record be made.

No such record was made so that Petitioner cannot be sure of the basis of the trial court determinations, yet it is apparent that there was a finding of its being either immaterial or non-exculpatory. The Supreme Court of Georgia concluded that this information was immaterial.

Yet, the lower federal courts have recognized the obvious value to an accused of this type of information. In Williams v. Dutton,400 F 2d 797(5th Cir., 1978), the Court reasoned that evidence which may serve to impeach the testimony of a Government witness is discoverable under Brady, supra, because the duty of disclosure upon the State applies to any information, "favorable to the accused either as direct or impeaching evidence." See also, United States v. Keogh, 391 F 2d 138(2nd Cir., 1968); Guerrero v. Beto, 384 F 2d 886 (5th Cir., 1968); Powell v. Wiman, 287 F 2d 275 (5th Cir., 1961) (mental instability on part of key prosecution witness); In Re Ferguson, 489 F 2d. 1234 (9th Cir., 1971).

Further, the Supreme Court's determination of immateriality in this case has also denied Petitioner of his right to a fair trial, and to his right to cross examine witnesses. The fact that the Supreme Court of Georgia acknowledges the potential exculpatory nature of the undisclosed material should, because that material is admissable under the Georgia Rules of Evidence, lead to a finding of materiality. Otherwise, the rule would soon be guted by Appellate Courts, attempting to make a deter-

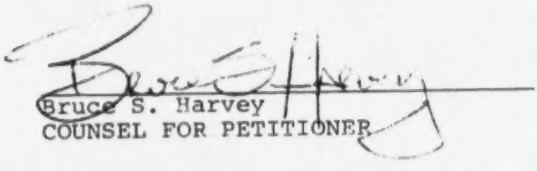
mination as to the weight of the evidence, a determination that has long been reserved as the exclusive province of the jury.

In short, there is no meaningful way, at this point in time, to measure the affect that the undisclosed information may have had upon the minds of the jurors at trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Georgia.

Respectfully submitted,



Bruce S. Harvey
COUNSEL FOR PETITIONER

P.O. Box 906
Clayton, Georgia 30525
Phone: (404) 782-4575

Supreme Court of the United States

No. A-223

JOSEPH WILSON, JR.,

Petitioner,

v.

GEORGIA

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Nov. 21, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 10th
day of September, 19 80.

3.60

In the Supreme Court of Georgia

Decided: JUN 10 1980

35987. JOSEPH WILSON, JR. v. STATE.

HILL, Justice.

This is a death case. From the presentation of the evidence the jury was authorized to find the following: The defendant, Joseph Wilson, Jr., and the victim, George A. Knox, and the victim's girl friend, Patty Johnson, were involved one to another or all together in some sort of drug deal.

On the evening of February 23, 1979, the defendant told two witnesses that he was going to blow the victim away. At about 9:45 p.m. that night the defendant abducted the victim at gunpoint from Patty Johnson's house in Cobb County. The victim was in the house with Ms. Johnson and two of his friends when the defendant entered the house carrying a 12-gauge, sawed-off shotgun. He pointed the gun at the victim and said something to the effect that "You set me up", or "You put the heat on me." The victim denied the allegation. The two friends, David and Kenneth Burns, attempted to leave but the defendant pointed the shotgun at them. After being assured that these two knew nothing, the defendant permitted them to go. The defendant again pointed the shotgun at the victim and said, "Let's go." The victim attempted to take his jacket and a chain that he carried, allegedly for protection, but was told he wouldn't need them. The defendant and the victim left the house in the defendant's truck. The Burns brothers saw them come out of the house. Later that night the defendant talked with Ms. Johnson over the telephone and told her that the victim had been "taken care of." The defendant told her to get rid of the victim's jacket.

The victim's body was found the next morning in a field in Forsyth County. He had been shot by a 12-gauge shotgun blast between the eyes at close range. The evidence at the scene indicated that the body was found where the shooting occurred. A neighbor testified that she heard a shot at about 1 a.m. There were no other wounds on the body. The defendant was subsequently arrested, indicted, tried, and based primarily upon the testimony of Patty Johnson, David and Kenneth Burns and the investigating officers, was convicted of the murder of George A. Knox, the kidnapping with bodily injury of George A. Knox, and possession of a firearm during the commission of a crime. He was sentenced to death for the murder based on the statutory aggravating circumstance found by the jury, kidnapping with bodily injury to the victim. He was also sentenced to life imprisonment for kidnapping with bodily injury and to five years for possession of the firearm.[1/] The evidence was sufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, ____U.S.____ (99 SC 2781, ____LE2d ____)(1979).

Prior to trial, the defendant filed a 12 paragraph "Motion for Discovery" stating that it was made under authority of Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963), and other cited cases, and under authority of Code Ann. §§ 38-801, 38-802. This motion called for some items particularly (e.g., statement of Patty Johnson) and described some items generally (e.g., memoranda or reports of law enforcement officers from Forsyth, Cobb and Gwinnett Counties regarding the defendant

---

/1/ At the guilt-innocence trial the defendant sought to establish that he was at home with his wife on the night of the murder. At the sentencing trial he admitted that Ms. Johnson had testified truthfully as to his taking the victim from her house and testified that the victim was abducted from him by two men after he and the victim left the Johnson home.

and the case). The motion called for the production of these items at all pretrial hearings and at trial and asked that defense counsel be permitted to examine the documents or, if examination be denied, that the court conduct an in camera inspection of such documents and that counsel be permitted to examine exculpatory materials found by the court in the in camera inspection. 2/

On June 13, 1978, the defendant filed a notice to produce calling for production pursuant to Code Ann. §§ 38-801, 38-802 of eight categories of specifically described items (some of which were listed in the earlier "Motion for Discovery") at a pretrial hearing set for the following day. Following that hearing, the court entered an order requiring the state to submit much of the requested material to the defendant for examination and requiring the district attorney and Forsyth County sheriff to submit their files to the court for an in camera inspection looking for exculpatory materials. The trial judge conducted the in camera inspection and initialed in red ink the materials he reviewed.

After the defendant examined the statements of Patty Johnson and David and Kenneth Burns, the defendant filed another notice to produce seeking to require the state to produce copies of those statements at any pretrial hearing and at trial.

1. The defendant has enumerated three alleged errors on the guilt-innocence phase of the trial. Two of these enumerations, with subparts, deal with the production of documents. In substance defendant complains that the trial court erred (1) in failing to provide the defendant with exculpatory material found during the in camera inspection, (2) in failing to find that the statements of Patty Johnson and David and Kenneth Burns were

---

/2/ For the reasons which appear below, we do not approve of the practice of combining in one motion items sought by notice to produce with items sought pursuant to Brady v. Maryland, supra.

exculpatory, (3) in failing to furnish copies of the statements of Patty Johnson and David and Kenneth Burns to defendant's counsel, and (4) in failing to make a record or inventory of the materials the court examined in camera or to require that they be deposited in the registry of the court, thereby depriving the defendant of the right of appellate review of the in camera inspection.[3/]

In Brown v. State, 238 Ga. 98, 101 (231 SE2d 65) (1976), this court held that, pursuant to Code Ann. § 38-802, the notice to produce provisions of Code Ann. § 38-801(g) are applicable in criminal cases. As was pointed out in Brown, 238 Ga. at 100, sections 38-801 and 38-802 of our Code are unrelated to disclosure of exculpatory materials pursuant to Brady v. Maryland, supra.

Notices to produce under Code Ann. § 38-801(g) can be used in a criminal case "to compel production of books, writing or other documents or tangible things in the possession, custody or control" of the opposite party, the State (district attorney and investigating officers),[4/] for use at trial, or at a pretrial evidentiary hearing, where such books, etc., would be admissible and are needed for use as evidence on behalf of the defendant.[5/] Natson v. State, 242 Ga. 618 (5) (250 SE2d 420) (1978). Such a notice to produce may be quashed or modified if it is unreasonable or oppressive. Code Ann. § 38-801(b). A notice to produce cannot be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district

---

/3/ This case was tried before enactment of the 1980 act providing for discovery of the defendant's confession or statements made in police custody and for discovery of scientific reports to be used by the state (e.g., crime lab reports, autopsy reports, blood alcohol test reports). Ga. L. 1980, p. ____ [H.B. No. 672, Act No. 1333].

/4/ A separate subpoena duces tecum directed to the investigating officers may be necessary. See Booker v. State, 242 Ga. 773 (1) (251 SE2d 518) (1979).

/5/ A notice to produce in a criminal case under Code Ann. § 38-801(g) is not as all inclusive as a request to produce discoverable evidence under our Civil Practice Act, Code Ann. §§ 81A-134(a), 81A-126(b).

attorney's file. Natson v. State, supra. As was held in Natson, a notice to produce cannot be used in a criminal case to require the production of the district attorney's work product; reports, memoranda and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts.[6] As was pointed out in Stevens v. State, 242 Ga. 34 (1) (247 SE2d 838) (1978), witness statements are not subject to notice to produce, although exculpatory witness statements are subject to disclosure under Brady v. Maryland, supra. Accord: Hamby v. State, 243 Ga. 339 (2) (253 SE2d 759) (1979); Spain v. State, 243 Ga. 15 (2) (252 SE2d 436) (1979).

Brady v. Maryland, supra, requires that, on motion for production of specific material, the defendant be furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment.[7] Where a Brady motion is made and the prosecutor does not make the specified material available to defense counsel, the trial judge should make an in camera inspection of the material sought. Payne v. State, 233 Ga. 294, 296 (210 SE2d 775) (1974); Fleming v. State, 236 Ga. 434, 438 (224 SE2d 15) (1976); Watts v. State, 239 Ga. 725, 727 (238 SE2d 894) (1977). On motion by the defendant the material examined in camera should either be sealed and filed, Durham v. State, 239 Ga. 697 (3b) (238 SE2d 334) (1977); or an inventory or record of the examined material made, so as to permit appellate review, Dickey v. State, 240 Ga. 634, 637, fn. 1 (242 SE2d 55) (1978).[8] Once the material is sealed or inventoried by the trial court, the appellate court can, upon the defendant's showing cause, exercise its discretion and call for the examined material.

/6/ The names of the state's witnesses are obtainable under Code § 27-1403.

/7/ The United States Supreme Court has held that a prosecutor is under a duty to furnish the defendant, without request, material which creates a reasonable doubt as to the defendant's guilt. United States v. Agurs, 427 U. S. 97 (SC , LE2d) (1975).

/8/ As can be seen from the above discussion, the in camera inspection looking for possibly exculpatory material is one of the progeny of Brady v. Maryland, supra. A notice to produce does not result in an in camera inspection.

In the case before us the defendant moved that the examined materials be sealed and filed for appellate review and we have ordered that those materials which the trial judge examined in camera be sealed and transmitted to this court under certificate of the judge as to whether the file contains all the materials examined by him. The trial judge had initialed the materials he examined and he has certified that to the best of his knowledge and belief those materials he examined, excluding any admitted into evidence during the trial, have now been transmitted to this court, together with other materials later placed in the files. In addition, the trial judge's certificate is supported by affidavits of the prosecuting attorney and the investigating officer. Subpart four (4) of defendant's enumeration of error, above (failure to make a record of the examined materials so as to permit appellate review), has been rendered moot.[9/]

We have examined the material furnished to us and find no exculpatory material, with one possible exception (not examined by the trial judge prior to trial). A Georgia Crime Information Center report reflects that one David Burns was convicted on four counts of dangerous drugs and bad check and was given three months probation and required to pay $36 in restitution. Such information was called for by defendant's motion for discovery. However, in view of the corroboration of witness David Burns' testimony by Kenneth Burns and Patty Johnson, as well as the subsequent corroboration of the testimony of Patty Johnson by the defendant, we find that this information was not material either to defendant's guilt or punishment. Brady v. Maryland,

---

/9/ Owens v. State, 233 Ga. 869 (214 SE2d 173) (1975), is not applicable here. That case involved the post trial recreation of testimony of potential jurors whereas this case involves the transmission of files containing written documents.

supra. Hence, subpart one (1) of defendant's enumeration of error, above, is not grounds for reversal.

Whether or not the statements of Patty Johnson and David and Kenneth Burns were exculpatory is immaterial; they were made available to the defendant. Thereafter it was not the responsibility of the court to determine if those statements were exculpatory. It was not error to refuse to make copies of those statements for defense counsel where counsel saw those statements in advance of trial and had them available for use at trial. Subparts two (2) and three (3) of defendant's enumeration of error, above, are not grounds for reversal.

2. In his final enumeration defendant asserts error in the admission of testimony by the investigating officer as to out-of-court conversations that he had with certain witnesses. The victim's driver's license and a payroll check were found on his body. Through the employer, an address for the victim was obtained. The house had burned. Patty Johnson, who lived next door, was interviewed to find out where the occupants of the burned house had moved. The officer testified on direct examination that he learned from Patty Johnson the names of the people who had been living next door with the victim until the fire. Patty Johnson told the officer during this interview that she last saw the victim on the afternoon before the murder. He testified that he located and interviewed the former neighbors. At this point the defense objected to any testimony concerning conversations, but the trial court allowed the testimony to explain the officer's conduct of the investigation. See Code § 38-302. The officer said that information he received from the victim's former housemates led him back to Patty Johnson. The defendant asserts that after this information was given, it was error for the prosecutor to ask, "How did you determine

that, or why did you go back to Patty Johnson's after talking with these people?" This question elecited testimony from the officer that he learned the name "Joey Wilson" from the victim's former housemates and information which indicated that Patty may have seen the victim later than she had admitted. This had led him back to Patty Johnson.

Defendant asserts that the state's purpose was to put before the jury the exact words of an out-of-court declaration and that the suspicion that Patty Johnson had misstated the time she last saw the victim was prejudicial. No exact words were repeated. The testimony of the officer merely showed why he returned to talk with Patty Johnson. Patty Johnson later testified that the victim had been at her house at about 9:45 p.m. on the evening in question. The former neighbors later testified that the defendant had told them he was going to blow the victim away. Any error in admitting the officer's testimony for the limited purpose of explaining his conduct was rendered utterly harmless by the subsequent admission of the testimony of the witnesses referred to by the officer. Mooney v. State, 243 Ga. 373 (5) (254 SE2d 337) (1979); Arnold v. State, 236 Ga. 534 (5) (224 SE2d 386) (1976).

3. Sentence Review. (A) Code Ann. § 27-2537 requires this court to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." One prospective juror was stricken for cause under Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968). The transcript of voir dire shows that this juror was properly disqualified.

In his closing argument in the sentencing phase, the prosecutor began by addressing his remarks to the trial court with the jury present. He argued four points in favor of imposing

the death penalty (retribution, deterrence, protection of society by removal, and rehabilitation). The prosecutor quoted Gregg v. Georgia, 428 U.S. 153, 183-184 (96 SC 2909, 49 LE2d 859) (1976), on the retribution theory justifying the imposition of the death penalty. He argued the tendency of the defendant to escape, as evidenced by his past record, and noted that the Alday murderers were escapees. [See Coleman v. State, 237 Ga. 84, 96 (226 SE2d 911) (1976).] Regarding protection of society, he read to the trial court from Eberhart v. State, 47 Ga. 598, 610 (1873), attributing the remark to "a noted legal scholar of the 1800's." The prosecutor next addressed his remarks specifically to the jury, referring back to his earlier argument and also quoting the state's argument to the United States Supreme Court in Gregg v. Georgia, supra, in reference to deterrence and protection of society.

We have condemned the practice of quoting from Eberhart v. State, supra. Hardy v State, 245 Ga. 272, 279 (SE2d) (1980); Hawes v. State, 240 Ga. 327, 335-336 (240 SE2d 833) (1977). The practice of quoting nevertheless has continued. Each case must be decided upon its own facts as to the question of passion, prejudice, etc. Ruffin v. State, 243 Ga. 95, 105 (252 SE2d 472) (1979). We will continue to review each case on that basis, giving particular scrutiny to quotations read in the presence of the jury. Reading the prosecutor's closing argument as a whole in this case we find that except for the extraneous and unnecessary reference to the Alday murders, he used the quotations referred to above in making a rational argument to the jury for imposition of the penalty of death, he did not make it appear that the judiciary approved imposition of the death penalty in this case, and we do not find that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor.

the murder was committed while the offender was engaged in the capital felony of kidnapping with bodily injury. Code Ann. §§ 27-2537(c)(2); 27-2534.1(b)(2). There was no evidence of bodily injury to the victim other than the shot which caused his death. Although the defendant in this case received only a life sentence for the offense of kidnapping with bodily injury, where the victim of the kidnapping is killed kidnapping with bodily injury is a capital felony for purposes of our statutory aggravating circumstances. Peck v. State, 239 Ga. 422, 431-432 (238 SE2d 12) (1977). This court has held that kidnapping with bodily injury and murder are not included crimes as a matter of law or fact and that where a kidnap victim is murdered the aggravating circumstance of kidnapping with bodily injury is supported by the evidence. Pryor v. State, 238 Ga. 698, 701, 703 (234 SE2d 918) (1977), Potts v. State, 241 Ga. 67, 86-87 (243 SE2d 510) (1978); Stephens v. Hopper, 241 Ga. 596, 600 (247 SE2d 92) (1978). The evidence supports the jury's finding of kidnapping with bodily injury beyond a reasonable doubt (see the statement of the facts of this case, above).[10/]

/10/ Because the aggravating circumstance found by the jury was that the offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping with bodily injury (a crime as to which the jury had found the defendant guilty), Code Ann. § 27-2534.1(b)(2), the decision in Godfrey v. Georgia ____ U. S. ____ (No. 78-6899 decided May 19, 1980) is not involved here. As the United States Supreme Court noted in Godfrey, supra (opinion of the Court, fn. 2), ground (2) of Code Ann. § 27-2534.1(b) is more specific and objectively measurable than ground (7).

(C) In reviewing the sentence of death, we must determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty for murder. The cases show that juries are not unwilling to impose the penalty of death for murder where the victim has been kidnapped and deliberately put to death.

The evidence shows that the defendant, carrying a shotgun, sought out the victim intending to kill him, that he transported the victim at gunpoint to a secluded spot at night, and that he deliberately murdered the victim by shooting him between the eyes with the shotgun at close range. The sentence of death imposed upon Joseph Wilson, Jr., is not excessive or disproportionate considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

35987. WILSON v. STATE

APPENDIX

1. Pryor v. State, 238 Ga. 698 (234 SE2d 918) (1976)
2. Morgan v. State, 241 Ga. 485 (246 SE2d 198) (1978)
3. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
4. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979)
5. Hardy v. State, 245 Ga. 272 (SE2d) (1980)
6. Dampier v. State, 245 Ga. 427 (SE2d) (1980)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RECEIVED
DEC 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-5778

ORIGINAL COPY

JOSEPH WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM B. HILL, JR.
Assistant Attorney General
Counsel of Record for
Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-2976

QUESTIONS PRESENTED

1.

Whether Petitioner's contentions 1 through 4, which are raised for the first time here on this petition for certiorari, are properly before this Court for consideration in reaching its decision on whether the requested writ of certiorari should be granted.

2.

Whether the Supreme Court of Georgia properly concluded, after an appellate review of the district attorney's file, that no exculpatory evidence material either to Petitioner's guilt or punishment was improperly denied Petitioner at trial.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
REASONS FOR NOT GRANTING THE WRIT	
A. AS PETITIONER'S CONTENTIONS NOS. 1 THROUGH 4 ARE RAISED FOR THE FIRST TIME HERE ON THIS PETITION FOR CERTIORARI, THEY ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED BY THE COURT IN REACHING ITS DECISION ON WHETHER THE REQUESTED WRIT OF CERTIORARI SHOULD BE GRANTED	10
B. THE SUPREME COURT OF GEROGIA PROPERLY CONCLUDED, AFTER AN APPELLATE REVIEW OF THE DISTRICT ATTORNEY'S FILE, THAT NO EXCULPATORY EVIDENCE MATERIAL EITHER TO PETITIONER'S GUILT OR PUNISHMENT WAS IMPROPERLY DENIED PETITIONER AT TRIAL. . .	11
CONCLUSION.	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

Cases cited:	Page
Brady v. Maryland, 373 U.S. 83 (1963)	12, 13, 14
Cardinale v. Louisiana, 394 U.S. 437, 438-439 (1969)	10
Estate of Wilson v. Akin Industries, Inc., 439 U.S. 877 (1978)	10, 11
Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974)	11
Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976)	12, 13
Moore v. Illinois, 408 U.S. 786, 799 (1972)	10, 12
Nations v. State, 234 Ga. 709, 217 S.E.2d 287 (1975)	11
United States v. Agurs, 427 U.S. 97 (1976)	13
Wilson v. State, 246 Ga. 62, ___S.E.___(1980)	1
Wisdom v. State, 234 Ga. 650, 217 S.E.2d 244 (1975)	14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80- 5778

JOSEPH WILSON, JR.,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

PART ONE

STATEMENT OF THE CASE

(i)

Petitioner seeks to have this Court review the decision of the Supreme Court of Georgia in Wilson v. State, 246 Ga. 62, ___S.E.___ (1980), rendered on June 10, 1980, affirming Petitioner's convictions for murder, kidnapping with bodily injury, and possession of a firearm during the commission of a crime.[1/]

1/ A copy of the decision of the Supreme Court of Georgia, the brief filed by Petitioner on direct appeal, and Petitioner's motion for rehearing are attached hereto as Respondent's Appendices A through C respectively.

Sentences of death, life imprisonment, and five consecutive years imprisonment were respectively imposed. Petitioner's motion for rehearing was denied on June 24, 1980.

On or about August 21, 1980, Petitioner applied to this Court for an extension of time within which to file his petition for a writ of certiorari. On September 10, 1980, as revealed by an examination of Petitioner's Appendix B, this Court granted Petitioner an extension of time within which to file his petition to, and including November 21, 1980. On or about November 21, 1980, as revealed by an examination of Petitioner's certificate or service, Petitioner filed this instant petition for a writ of certiorari.

(ii)

STATEMENT OF THE FACTS

On Friday, February 23, 1979, the Petitioner, Joseph Wilson, kidnapped George A. Knox, taking him from a house at gunpoint to a field in south Forsyth County. The Petitioner then executed Knox by shooting him between the eyes.

Knox lived temporarily with his girlfriend, Patty Johnson, at 2596 Austell Road in Cobb County. (T. 602, 606). Ms. Johnson met the Petitioner, Wilson, through the victim George A. Knox. (T. 609). Petitioner visited Knox at Ms. Johnson's house approximately four times, each time Petitioner carried a double-barrel sawed-off shotgun. (T. 610, 614, 616). On February 16, 1979, Petitioner interjected himself into a telephone conversation between Ms. Johnson and Knox by placing an emergency phone call to Knox. (T. 617). Knox told Ms. Johnson that Petitioner had wanted her to help him

sell a quantity of marijuana. (T. 617). Petitioner later called Ms. Johnson to get her response, and to make arrangements to deliver the marijuana to Ms. Johnson on February 23. (T. 618, 619).

Pursuant to an agreement between Petitioner and Knox made the week prior to the murder, Knox planned to leave a set of keys for Petitioner on the bumper of a car parked near Ms. Johnson's house. (T. 621, 622). For that service, Knox was to receive a rather large sum of money from Petitioner. (T. 621). On the night Petitioner planned to pick up the keys, Knox arranged to have a third party make a duplicate set of the keys before Petitioner arrived. (T. 623). Neither the original keys nor the duplicates were returned to Knox that night. (T. 625). Knox became scared and left the house because he knew Petitioner would be looking for him, and for the keys. Petitioner telephoned Ms. Johnson, but did not come by her house. (T. 624, 625). Ms. Johnson testified that the incident created animosity between Petitioner and Knox. (T. 621). The day after the incident, Knox told Ms. Johnson that he and Petitioner were back on congenial terms. (T. 625-627).

On Friday, February 23, 1979, Knox stopped by Ms. Johnson's house at noon, and again during the evening. (T. 630). Three witnesses were present when Petitioner abducted Knox from Ms. Johnson's house. Kenneth and David Burns went to Ms. Johnson's house at approximately 9:00 p.m. to visit with Knox. (T. 633, 634, 762, 804). Knox was not there, so the Burnses decided to wait. (T. 805). Ms. Johnson told the men that they would have to leave when Petitioner arrived. (T. 765, 805). At approximately 9:10 p.m. Knox called and asked if someone would pick him up at a

nearby service station. (T. 635, 763, 806, 821). Shortly, after Ken Burns left to pick up Knox, Knox arrived at the house via another ride at approximately 9:25 p.m. (T. 636, 764, 772, 806, 807, 822). Burns later returned and everyone continued drinking beer. (T. 637, 764, 765, 808). Knox and the Burnses sat on the sofa while Ms. Johnson sat nearby. (T. 637, 766). Witnesses testified that Knox always carried a chain covered with tape, possibly for use as a weapon. (T. 629, 766).

At approximately 9:30 p.m. Petitioner telephoned Ms. Johnson asking if Knox was there. (T. 639). Petitioner told Ms. Johnson not to tell Knox that he was on his way to the house. (T. 640). Petitioner arrived approximately fifteen minutes later, carrying the murder weapon, a 12 guage shotgun. (T. 637, 639, 641, 766, 780, 809, 825). Petitioner pointed the shotgun in Knox's face insisting that Knox had "set him up" and "put the heat on." (T. 641, 768, 781, 809, 810, 828). Knox denied the accusations. (T. 641, 768, 828). The Burnses became scared and started to leave. (T. 641, 768, 769, 828).

Still pointing the shotgun, Petitioner told Knox, "let's go." (T. 642). When Knox reached for his coat and chain Petitioner told him that he would not need them. (T. 642). Witnesses saw Petitioner walk out the door behind Knox, holding the shotgun pointed at Knox's back. (T. 642, 769, 787, 811, 830).

Shortly after Petitioner and Knox left Ms. Johnson's house, Petitioner's wife, Jody, telephoned and asked if Knox had left with Petitioner. (T. 646). Approximately an hour later Ms. Johnson telephoned Petitioner's house and Petitioner answered. (T. 646, 705). Petitioner stated that Knox was

at his house and that he was all right. In an effort to keep secret the identity of the caller from the others in the room with him Petitioner told Ms. Johnson, "Tell Betty and the kids hi for me." (T. 647).

Later that night, at approximately 2:00 a.m. on February 24, Petitioner, telephoned Ms. Johnson and stated "George has been taken care of." (T. 648, 649). Petitioner instructed Ms. Johnson to dispose of Knox's coat. (T. 649). Petitioner told Ms. Johnson to call him only from a pay phone and if asked, tell the police she last saw Knox at Friday noon. (T. 650, 653). Ms. Johnson threw Knox's jacket in the burned out frame of the house next door. (T. 651).

Mrs. Frances Lane lived just off Rogers Road, a rural area in Cummings, Georgia. (T. 572). Shortly before 1:00 a.m. on February 24, Mrs. Lane heard a gunshot ring from the pasture near her home. (T. 573-575). Later that morning, Mrs. Lane spotted a body lying in the pasture approximately 300 yards from her house and summoned a neighbor, Albert Mayes. (T. 576-578, 584). Mr. Mayes telephoned the police after observing that the face of the body had been blown off. (T. 587, 588).

Jimmy C. Adams of the Forsyth County Sheriff's Department, arrived at the scene of the murder and found a body with an open forehead wound. (T. 418, 419, 423). A tatoo initialed "GK", a driver's license, and miscellaneous papers all served to identify the victim as George A. Knox. (T. 426-428). Cash register receipts dated February 23, indicated that the victim had been alive the previous day. (T. 429). Sixteen dollars in cash was found in the victim's wallet. (T. 553).

Aside from matter from the wound, no other physical evidence was found in the area. (T. 422). The heavy rainfall during the night destroyed evidence of tire tracks. (T. 547).

Dr. Larry Howard testified that the cause of death was a three and one-half inch gunshot wound to the face centered between the eyes. (T. 726, 736). The facial area was heavily damaged, resulting in almost total destruction of the brain. (T. 727, 728). No other injuries or bruises were noted on the body. (T. 727). Dr. Howard recovered a large amount of shot and wadding along with a plastic shot cup from inside the head. (T. 728). Dr. Howard testified that the items recovered were consistent with the remains of a shell fired from a 12 guage shotgun. (T. 728). The wound indicated that the distance of fire was approximately five feet. (T. 729). State Crime Lab officials conducted alcohol and drug tests on the victim, the results of which were negative. (T. 795, 798).

Joseph Evankouech sold Petitioner the 12 guage shotgun in December, 1978. (T. 839, 840, 847). At that time, the barrel was not sawed off. (T. 847). David Schaffer testified that he saw Petitioner with the shotgun on two occasions. (T. 847). On the second occasion, the shotgun barrel had been sawed off. (T. 848).

Glennis Abee and Alma Ruth Johnson testified that Petitioner came to their apartment at approximately 8:00 p.m. on February 23, 1979. (T. 524, 1073, 1074, 1092, 1098). Petitioner showed Abee and Johnson a roll of shotgun shells. (T. 1074, 1075, 1093). Petitioner asked Abee if she had seen Knox and stated that he (Petitioner) was going to

"blow his mother-fucking brains out." (T. 523, 524, 1076). Petitioner made a similar threatening statement regarding Knox to Alma Johnson. (T. 524, 1093).

Investigators first spoke with Patty Johnson on Saturday, February 24, 1979, and informed her Knox had been murdered. (T. 434, 653, 654). Ms. Johnson stated then that she last saw Knox at noon on Friday. (T. 557, 655). Ms. Johnson later gave a statement to police relating information about the kidnapping and murder. (T. 442, 443, 656). The Burnses both gave statements to police in regards to witnessing the kidnapping. (T. 444, 445). Various statements made by Petitioner's relatives, friends, and witnesses led police to Petitioner. Petitioner was arrested on February 27, 1979, at his home in Shadowpark Trailer Park in Norcross. (T. 446, 464, 885). Petitioner was interviewed at 8:30 a.m. that morning. (T. 448, 456). Following a Jackson v. Denno hearing, the court ruled Petitioner's statement to be knowingly and voluntarily made, and admissible. (T. 449-499).

In his defense, Jody Wilson, Petitioner's wife, testified that Petitioner left their house on February 23, 1979, at approximately 7:00 p.m. and returned home alone at 10:00 p.m. (T. 887-900). Jody testified that Petitioner made one telephone call to a friend, Terry Morgan, at 10:15 p.m., but did not leave the house again that night. (T. 888, 891, 899, 900). Morgan lived with Petitioner's father. (T. 899). Jody testified that Petitioner bought the shotgun for her use in a gunsmithering class and that he (Petitioner) sawed off the barrel for easy handling. (T. 901, 902). Jody testified that Ms. Johnson repeatedly telephoned her home stating that she needed to talk with her. (T. 906).

In rebuttal, Ms. Johnson testified that Jody actually telephoned her requesting that they meet. (T. 930). Ms. Johnson contacted Officer Adams concerning the meeting and an electronic surveillance was set up at Ms. Johnson's house. (T. 911, 912, 920, 922, 930, 931). A meeting between Ms. Johnson and Jody was had on March 4, 1979. (T. 912, 916). During their conversation, Jody expressed her apprehension that the house was bugged. (T. 952, 954). Jody stated to Ms. Johnson that Petitioner made a phone call to his father shortly after 11:00 p.m. on February 23, and that Knox was murdered between 12:00 p.m. and 2:00 a.m. (T. 956). Ms. Johnson asked Jody "What did you all do with that gun?" (T. 964). Jody replied, it would not be found, "there's pieces here and there's pieces there, and there's pieces everywhere." (T. 964).

Petitioner's father, Joseph Wilson, Sr., lives in Chattanooga, Tennessee. Mr. Wilson testified that Petitioner brought the shotgun to Chattanooga in late January. (T. 871). Mr. Wilson stated that he brought the shotgun to Atlanta on February 11, 1979, but took it back with him to Chattanooga on the same day. (T. 871, 872). Mr. Wilson further testified that he disposed of the shotgun on the following day. (T. 873).

Jody testified that Mr. Wilson told her that he had gotten rid of the shotgun although Mr. Wilson testified that he had not told anyone that he had destroyed the shotgun. (T. 880, 881). Mr. Wilson denied that Jody brought the gun to him to be destroyed following Petitioner's arrest. (T. 881-882). Abee testified that Petitioner brought a sawed-off shotgun to her house on February 14, 1979. (T. 1085, 1086).

On the witness stand, Petitioner reiterated his statement made to police following his arrest. Petitioner denied kidnapping or killing Knox. (T. 1036). Petitioner denied going to Ms. Johnson's house on February 23, 1979, or calling Ms. Johnson and instructing her to dispose of Knox's belongings. (T. 1030, 1037). Petitioner denied that he saw Knox on February 23, 1979. (T. 982). Petitioner testified that he stated to Alma Johnson that he should kick George's ass, but denied making any other threatening statements. (T. 991, 992, 1009). Petitioner denied showing Alma a shotgun shell, stating that what he showed her was actaully a roll of pennies. (T. 1005, 1006, 1008). Petitioner testified that he arrived home at approximately 10:15 p.m. on February 23 and remained there until the following day. (T. 993, 996). Petitioner also denied ever having "dope" deals with Ms. Johnson or Knox. (T. 1031, 1032). Additional facts will be developed as needed for a more thorough illumination of any issues presented here on this petition.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. AS PETITIONER'S CONTENTIONS NOS. 1 THROUGH 4 ARE RAISED FOR THE FIRST TIME HERE ON THIS PETITION FOR CERTIORARI, THEY ARE NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED BY THE COURT IN REACHING ITS DECISION ON WHETHER THE REQUESTED WRIT OF CERTIORARI SHOULD BE GRANTED.
(Contentions Nos. 1 through 4).

In this instant case an examination of Respondent's Appendices A, [decision of Supreme Court of Georgia on direct appeal], B [briefs of Petitioner on direct appeal], and C [petition for rehearing], readily reveals that Petitioner's contentions nos. 1 through 4 constitute alleged federal constitutional issues raised for the first time by the Petitioner here on this petition for a writ of certiorari. In this regard, in Estate of Wilson v. Akin Industries, Inc., 439 U.S. 877 (1978), this Court stated that:

> "It is well settled that certiorari will not be granted where a federal constitutional issue is raised here for the first time on review of a state-court decision. Moore v. Illinois, 408 U.S. 786, 799 (1972); Cardinale v. Louisiana, 394 U.S. 437, 438-439 (1969). There appears to be an exception to that rule, however, whenever the federal issue arose from an unanticipated ruling by the state court, the petition for rehearing presented the first

opportunity to raise it, and that opportunity was seized. (Cites omitted)." Estate of Wilson, supra, at 879.

In Accordance with Estate of Wilson, supra, an examination of Respondent's Appendices A through C reveals that Petitioner's attempt to litigate his contentions nos. 1 through 4 for the first time here on this instant petition does not fall within the exception enunciated in Estate of Wilson, supra.

Accordingly, for the foregoing reasons, Petitioner's contentions nos. 1 through 4 present nothing for consideration by this Court.

B. THE SUPREME COURT OF GEORGIA PROPERLY CONCLUDED, AFTER AN APPELLATE REVIEW OF THE DISTRICT ATTORNEY'S FILE, THAT NO EXCULPATORY EVIDENCE MATERIAL EITHER TO PETITIONER'S GUILT OR PUNISHMENT WAS IMPROPERLY DENIED PETITIONER AT TRIAL. (Contention No. 5).

In Nations v. State, 234 Ga. 709, 217 S.E.2d 287 (1975), the Supreme Court of Georgia stated that:

"There is no Georgia statute nor rule of practice which requires the district attorney to open his files to the accused, nor is the accused entitled as a matter of right to receive copies of police reports and investigation reports made in the course of preparing the case against the client." 2/ Hicks v. State, 232 Ga. 393, 207 S.E.2d 30 (1974).

2/ This instant case was tried before enactment of the 1980 Act providing for discovery of the defendant's confession or statements made in police custody, and for discovery of scientific reports to be used by the state, e.g., crime lab reports, autopsy reports, blood alcohol tests, etc. Ga. Laws 1980, p. __ (H.B. No. 672, Act No. 1333).

However, discovery in the Georgia courts must constantly be considered in light of Brady v. Maryland, 373 U.S. 83 (1963). The rule upon which the decisions are based reads as follows:

> "Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (Emphasis added). Brady, supra at 87; Lundy v. State, 139 Ga. App. 536, 228 S.E.2d 717 (1976).

Implicit in the rule as stated in Brady, supra, is the requirement that the suppressed evidence be material either to guilt or to punishment. Moore v. Illinois, 408 U.S. 786 (1972).

In this instant case the appellate court conducted an examination of the district attorney's files in conjunction with Petitioner's contention on direct appeal that he had been denied favorable evidence by the prosecution. An examination of the opinion rendered by the Supreme Court of Georgia reveals that, with the possibility of one exception, it found no exculpatory material not provided the Petitioner. The one aforementioned exception concerns a Georgia Crime Information Center report which reflected that David Burns, who testified against Petitioner at trial, was convicted on four counts of dangerous drugs and bad check and was given three months probation and required to pay $36.00 in restitution. At this point the Respondent notes that the Georgia Crime Information Center report was not examined by the trial judge prior to trial.

While Petitioner contends that the Georgia Crime Information Center report on David Burns should have been provided him under his Brady motion, Respondent notes that Petitioner has completely failed to demonstrate how the foregoing information was material either to his guilt or to punishment.

Assuming arguendo that there is present the element of suppression, on this petition for a writ of certiorari there still rests upon the Petitioner the burden of meeting the materiality requirements of Brady, supra. The Court of Appeals of Georgia in Lundy v. State, supra, at 539, citing United States v. Agurs, 427 U.S. 97 (1976), stated that:

> ". . . implicit in the requirement of materiality is a concern that the suppressed evidence might have effected the outcome of the trial . . .. The mere possibility that an item of undisclosed information might have helped the defense, or might have effected the outcome of the trial, does not establish 'materiality' in the constitutional sense. . .. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means the omission must be evaluated in the context of the entire record. . .. If there is no reasonable doubt about guilt, whether or not the additional evidence is considered, there is no justification for a new trial."

In this instant case the testimony of witness David Burns was corroborated by that of Kenneth Burns and Patty Johnson, as well as the subsequent corroboration of the testimony of Patty Johnson by the Petitioner himself. As is apparent upon an examination of the trial transcript, which examination will reflect the overwhelming evidence of Petitioner's guilt, the allegedly suppressed evidence concerning the Georgia Crime Information Center report on witness David Burns was immaterial to either Petitioner's guilt or punishment. In Wisdom v. State, 234 Ga. 650, 217 S.E.2d 244 (1975), the Supreme Court of Georgia correctly stated that:

> "[A]ppellant would still have the burden of showing that the denial of these statements to him so impaired his defense that he was denied a fair trial within the meaning of the Brady rule."

On this instant petition for a writ of certiorari, as on his direct appeal to the Georgia Supreme Court, Petitioner has completely failed to meet the materiality requirement under Brady, supra. Accordingly, this contention is clearly without merit.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia as it is manifest that no substantial federal question not previously decided by the court is presented, and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

WILLIAM B. HILL, JR.
Assistant Attorney General
Counsel of Record for the Respondent

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
First Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

WILLIAM B. HILL, JR.
132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-2976

D
Hill

In the Supreme Court of Georgia

Decided: JUN 10 1980

35987. JOSEPH WILSON, JR. v. STATE.

HILL, Justice.

This is a death case. From the presentation of the evidence the jury was authorized to find the following: The defendant, Joseph Wilson, Jr., and the victim, George A. Knox, and the victim's girl friend, Patty Johnson, were involved one to another or all together in some sort of drug deal.

On the evening of February 23, 1979, the defendant told two witnesses that he was going to blow the victim away. At about 9:45 p.m. that night the defendant abducted the victim at gunpoint from Patty Johnson's house in Cobb County. The victim was in the house with Ms. Johnson and two of his friends when the defendant entered the house carrying a 12-gauge, sawed-off shotgun. He pointed the gun at the victim and said something to the effect that "You set me up", or "You put the heat on me." The victim denied the allegation. The two friends, David and Kenneth Burns, attempted to leave but the defendant pointed the shotgun at them. After being assured that these two knew nothing, the defendant permitted them to go. The defendant again pointed the shotgun at the victim and said, "Let's go." The victim attempted to take his jacket and a chain that he carried, allegedly for protection, but was told he wouldn't need them. The defendant and the victim left the house in the defendant's truck. The Burns brothers saw them come out of the house. Later that night the defendant talked with Ms. Johnson over the telephone and told her that the victim had been "taken care of." The defendant told her to get rid of the victim's jacket.

The victim's body was found the next morning in a field in Forsyth County. He had been shot by a 12-gauge shotgun blast between the eyes at close range. The evidence at the scene indicated that the body was found where the shooting occurred. A neighbor testified that she heard a shot at about 1 a.m. There were no other wounds on the body. The defendant was subsequently arrested, indicted, tried, and based primarily upon the testimony of Patty Johnson, David and Kenneth Burns and the investigating officers, was convicted of the murder of George A. Knox, the kidnapping with bodily injury of George A. Knox, and possession of a firearm during the commission of a crime. He was sentenced to death for the murder based on the statutory aggravating circumstance found by the jury, kidnapping with bodily injury to the victim. He was also sentenced to life imprisonment for kidnapping with bodily injury and to five years for possession of the firearm.[1/] The evidence was sufficient to convince a rational trier of fact of defendant's guilt beyond a reasonable doubt. Jackson v. Virginia, ____U.S.____ (99 SC 2781, ____LE2d ____ (1979).

Prior to trial, the defendant filed a 12 paragraph "Motion for Discovery" stating that it was made under authority of Brady v. Maryland, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963), and other cited cases, and under authority of Code Ann. §§ 38-801, 38-802. This motion called for some items particularly (e.g., statement of Patty Johnson) and described some items generally (e.g., memoranda or reports of law enforcement officers from Forsyth, Cobb and Gwinnett Counties regarding the defendant

---

/1/ At the guilt-innocence trial the defendant sought to establish that he was at home with his wife on the night of the murder. At the sentencing trial he admitted that Ms. Johnson had testified truthfully as to his taking the victim from her house and testified that the victim was abducted from him by two men after he and the victim left the Johnson home.

and the case). The motion called for the production of these items at all pretrial hearings and at trial and asked that defense counsel be permitted to examine the documents or, if examination be denied, that the court conduct an in camera inspection of such documents and that counsel be permitted to examine exculpatory materials found by the court in the in camera inspection.[2/]

On June 13, 1978, the defendant filed a notice to produce calling for production pursuant to Code Ann. §§ 38-801, 38-802 of eight categories of specifically described items (some of which were listed in the earlier "Motion for Discovery") at a pretrial hearing set for the following day. Following that hearing, the court entered an order requiring the state to submit much of the requested material to the defendant for examination and requiring the district attorney and Forsyth County sheriff to submit their files to the court for an in camera inspection looking for exculpatory materials. The trial judge conducted the in camera inspection and initialed in red ink the materials he reviewed.

After the defendant examined the statements of Patty Johnson and David and Kenneth Burns, the defendant filed another notice to produce seeking to require the state to produce copies of those statements at any pretrial hearing and at trial.

1. The defendant has enumerated three alleged errors on the guilt-innocence phase of the trial. Two of these enumerations, with subparts, deal with the production of documents. In substance defendant complains that the trial court erred (1) in failing to provide the defendant with exculpatory material found during the in camera inspection, (2) in failing to find that the statements of Patty Johnson and David and Kenneth Burns were

---

/2/ For the reasons which appear below, we do not approve of the practice of combining in one motion items sought by notice to produce with items sought pursuant to Brady v. Maryland, supra.

exculpatory, (3) in failing to furnish copies of the statements of Patty Johnson and David and Kenneth Burns to defendant's counsel, and (4) in failing to make a record or inventory of the materials the court examined in camera or to require that they be deposited in the registry of the court, thereby depriving the defendant of the right of appellate review of the in camera inspection.[3/]

In Brown v. State, 238 Ga. 98, 101 (231 SE2d 65) (1976), this court held that, pursuant to Code Ann. § 38-802, the notice to produce provisions of Code Ann. § 38-801(g) are applicable in criminal cases. As was pointed out in Brown, 238 Ga. at 100, sections 38-801 and 38-802 of our Code are unrelated to disclosure of exculpatory materials pursuant to Brady v. Maryland, supra.

Notices to produce under Code Ann. § 38-801(g) can be used in a criminal case "to compel production of books, writing or other documents or tangible things in the possession, custody or control" of the opposite party, the State (district attorney and investigating officers),[4/] for use at trial, or at a pretrial evidentiary hearing, where such books, etc., would be admissible and are needed for use as evidence on behalf of the defendant.[5/] Natson v. State, 242 Ga. 618 (5) (250 SE2d 420) (1978). Such a notice to produce may be quashed or modified if it is unreasonable or oppressive. Code Ann. § 38-801(b). A notice to produce cannot be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district

---

/3/ This case was tried before enactment of the 1980 act providing for discovery of the defendant's confession or statements made in police custody and for discovery of scientific reports to be used by the state (e.g., crime lab reports, autopsy reports, blood alcohol test reports). Ga. L. 1980, p. ____ [H.B. No. 672, Act No. 1333].

/4/ A separate subpoena duces tecum directed to the investigating officers may be necessary. See Booker v. State, 242 Ga. 773 (1) (251 SE2d 518) (1979).

/5/ A notice to produce in a criminal case under Code Ann. § 38-801(g) is not as all inclusive as a request to produce discoverable evidence under our Civil Practice Act, Code Ann. §§ 81A-134(a), 81A-126(b).

attorney's file. Natson v. State, supra. As was held in Natson, a notice to produce cannot be used in a criminal case to require the production of the district attorney's work product; reports, memoranda and documents in the files of law enforcement officers; addresses and telephone numbers of the state's witnesses; or the names and addresses of other persons with knowledge of the facts.[6] As was pointed out in Stevens v. State, 242 Ga. 34 (1) (247 SE2d 838) (1978), witness statements are not subject to notice to produce, although exculpatory witness statements are subject to disclosure under Brady v. Maryland, supra. Accord: Hamby v. State, 243 Ga. 339 (2) (253 SE2d 759) (1979); Spain v. State, 243 Ga. 15 (2) (252 SE2d 436) (1979).

Brady v. Maryland, supra, requires that, on motion for production of specific material, the defendant be furnished exculpatory information; i.e., information favorable to the defendant and material either to guilt or punishment.[7] Where a Brady motion is made and the prosecutor does not make the specified material available to defense counsel, the trial judge should make an in camera inspection of the material sought. Payne v. State, 233 Ga. 294, 296 (210 SE2d 775) (1974); Fleming v. State, 236 Ga. 434, 438 (224 SE2d 15) (1976); Watts v. State, 239 Ga. 725, 727 (238 SE2d 894) (1977). On motion by the defendant the material examined in camera should either be sealed and filed, Durham v. State, 239 Ga. 697 (3b) (238 SE2d 334) (1977); or an inventory or record of the examined material made, so as to permit appellate review, Dickey v. State, 240 Ga. 634, 637, fn. 1 (242 SE2d 55) (1978).[8] Once the material is sealed or inventoried by the trial court, the appellate court can, upon the defendant's showing cause, exercise its discretion and call for the examined material.

/6/ The names of the state's witnesses are obtainable under Code § 27-1403.

/7/ The United States Supreme Court has held that a prosecutor is under a duty to furnish the defendant, without request, material which creates a reasonable doubt as to the defendant's guilt. United States v. Agurs, 427 U. S. 97 (SC , LE2d) (1975).

/8/ As can be seen from the above discussion, the in camera inspection looking for possibly exculpatory material is one of the progeny of Brady v. Maryland, supra. A notice to produce does not result in an in camera inspection.

In the case before us the defendant moved that the examined materials be sealed and filed for appellate review and we have ordered that those materials which the trial judge examined in camera be sealed and transmitted to this court under certificate of the judge as to whether the file contains all the materials examined by him. The trial judge had initialed the materials he examined and he has certified that to the best of his knowledge and belief those materials he examined, excluding any admitted into evidence during the trial, have now been transmitted to this court, together with other materials later placed in the files. In addition, the trial judge's certificate is supported by affidavits of the prosecuting attorney and the investigating officer. Subpart four (4) of defendant's enumeration of error, above (failure to make a record of the examined materials so as to permit appellate review), has been rendered moot.[9/]

We have examined the material furnished to us and find no exculpatory material, with one possible exception (not examined by the trial judge prior to trial). A Georgia Crime Information Center report reflects that one David Burns was convicted on four counts of dangerous drugs and bad check and was given three months probation and required to pay $36 in restitution. Such information was called for by defendant's motion for discovery. However, in view of the corroboration of witness David Burns' testimony by Kenneth Burns and Patty Johnson, as well as the subsequent corroboration of the testimony of Patty Johnson by the defendant, we find that this information was not material either to defendant's guilt or punishment. Brady v. Maryland,

---

/9/ Owens v. State, 233 Ga. 869 (214 SE2d 173) (1975), is not applicable here. That case involved the post trial recreation of testimony of potential jurors whereas this case involves the transmission of files containing written documents.

supra. Hence, subpart one (1) of defendant's enumeration of error, above, is not grounds for reversal.

Whether or not the statements of Patty Johnson and David and Kenneth Burns were exculpatory is immaterial; they were made available to the defendant. Thereafter it was not the responsibility of the court to determine if those statements were exculpatory. It was not error to refuse to make copies of those statements for defense counsel where counsel saw those statements in advance of trial and had them available for use at trial. Subparts two (2) and three (3) of defendant's enumeration of error, above, are not grounds for reversal.

2. In his final enumeration defendant asserts error in the admission of testimony by the investigating officer as to out-of-court conversations that he had with certain witnesses. The victim's driver's license and a payroll check were found on his body. Through the employer, an address for the victim was obtained. The house had burned. Patty Johnson, who lived next door, was interviewed to find out where the occupants of the burned house had moved. The officer testified on direct examination that he learned from Patty Johnson the names of the people who had been living next door with the victim until the fire. Patty Johnson told the officer during this interview that she last saw the victim on the afternoon before the murder. He testified that he located and interviewed the former neighbors. At this point the defense objected to any testimony concerning conversations, but the trial court allowed the testimony to explain the officer's conduct of the investigation. See Code § 38-302. The officer said that information he received from the victim's former housemates led him back to Patty Johnson. The defendant asserts that after this information was given, it was error for the prosecutor to ask, "How did you determine

that, or why did you go back to Patty Johnson's after talking with these people?" This question elecited testimony from the officer that he learned the name "Joey Wilson" from the victim's former housemates and information which indicated that Patty may have seen the victim later than she had admitted. This had led him back to Patty Johnson.

Defendant asserts that the state's purpose was to put before the jury the exact words of an out-of-court declaration and that the suspicion that Patty Johnson had misstated the time she last saw the victim was prejudicial. No exact words were repeated. The testimony of the officer merely showed why he returned to talk with Patty Johnson. Patty Johnson later testified that the victim had been at her house at about 9:45 p.m. on the evening in question. The former neighbors later testified that the defendant had told them he was going to blow the victim away. Any error in admitting the officer's testimony for the limited purpose of explaining his conduct was rendered utterly harmless by the subsequent admission of the testimony of the witnesses referred to by the officer. Mooney v. State, 243 Ga. 373 (5) (254 SE2d 337) (1979); Arnold v. State, 236 Ga. 534 (5) (224 SE2d 386) (1976).

3. Sentence Review. (A) Code Ann. § 27-2537 requires this court to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." One prospective juror was stricken for cause under Witherspoon v. Illinois, 391 U.S. 510 (88 SC 1770, 20 LE2d 776) (1968). The transcript of voir dire shows that this juror was properly disqualified.

In his closing argument in the sentencing phase, the prosecutor began by addressing his remarks to the trial court with the jury present. He argued four points in favor of imposing

the death penalty (retribution, deterrence, protection of society by removal, and rehabilitation). The prosecutor quoted Gregg v. Georgia, 428 U.S. 153, 183-184 (96 SC 2909, 49 LE2d 859) (1976), on the retribution theory justifying the imposition of the death penalty. He argued the tendency of the defendant to escape, as evidenced by his past record, and noted that the Alday murderers were escapees. [See Coleman v. State, 237 Ga. 84, 96 (226 SE2d 911) (1976).] Regarding protection of society, he read to the trial court from Eberhart v. State, 47 Ga. 598, 610 (1873), attributing the remark to "a noted legal scholar of the 1800's." The prosecutor next addressed his remarks specifically to the jury, referring back to his earlier argument and also quoting the state's argument to the United States Supreme Court in Gregg v. Georgia, supra, in reference to deterrence and protection of society.

We have condemned the practice of quoting from Eberhart v. State, supra. Hardy v State, 245 Ga. 272, 279 (SE2d) (1980); Hawes v. State, 240 Ga. 327, 335-336 (240 SE2d 833) (1977). The practice of quoting nevertheless has continued. Each case must be decided upon its own facts as to the question of passion, prejudice, etc. Ruffin v. State, 243 Ga. 95, 105 (252 SE2d 472) (1979). We will continue to review each case on that basis, giving particular scrutiny to quotations read in the presence of the jury. Reading the prosecutor's closing argument as a whole in this case we find that except for the extraneous and unnecessary reference to the Alday murders, he used the quotations referred to above in making a rational argument to the jury for imposition of the penalty of death, he did not make it appear that the judiciary approved imposition of the death penalty in this case, and we do not find that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor.

(B) We must next consider whether the evidence supports the jury's finding of the statutory aggravating circumstance that the murder was committed while the offender was engaged in the capital felony of kidnapping with bodily injury. Code Ann. §§ 27-2537(c)(2); 27-2534.1(b)(2). There was no evidence of bodily injury to the victim other than the shot which caused his death. Although the defendant in this case received only a life sentence for the offense of kidnapping with bodily injury, where the victim of the kidnapping is killed kidnapping with bodily injury is a capital felony for purposes of our statutory aggravating circumstances. Peck v. State, 239 Ga. 422, 431-432 (238 SE2d 12) (1977). This court has held that kidnapping with bodily injury and murder are not included crimes as a matter of law or fact and that where a kidnap victim is murdered the aggravating circumstance of kidnapping with bodily injury is supported by the evidence. Pryor v. State, 238 Ga. 698, 701, 703 (234 SE2d 918) (1977), Potts v. State, 241 Ga. 67, 86-87 (243 SE2d 510) (1978); Stephens v. Hopper, 241 Ga. 596, 600 (247 SE2d 92) (1978). The evidence supports the jury's finding of kidnapping with bodily injury beyond a reasonable doubt (see the statement of the facts of this case, above).[10/]

/10/ Because the aggravating circumstance found by the jury was that the offense of murder was committed while the offender was engaged in the commission of another capital felony, kidnapping with bodily injury (a crime as to which the jury had found the defendant guilty), Code Ann. § 27-2534.1(b)(2), the decision in Godfrey v. Georgia ____ U. S. ____ (No. 78-6899 decided May 19, 1980) is not involved here. As the United States Supreme Court noted in Godfrey, supra (opinion of the Court, fn. 2), ground (2) of Code Ann. § 27-2534.1(b) is more specific and objectively measurable than ground (7).

(C) In reviewing the sentence of death, we must determine whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In reviewing the death penalty in this case, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find the similar cases listed in the appendix support affirmance of the death penalty for murder. The cases show that juries are not unwilling to impose the penalty of death for murder where the victim has been kidnapped and deliberately put to death.

The evidence shows that the defendant, carrying a shotgun, sought out the victim intending to kill him, that he transported the victim at gunpoint to a secluded spot at night, and that he deliberately murdered the victim by shooting him between the eyes with the shotgun at close range. The sentence of death imposed upon Joseph Wilson, Jr., is not excessive or disproportionate considering the crime and the defendant.

Judgment affirmed. All the Justices concur.

35987. WILSON v. STATE

APPENDIX

1. Pryor v. State, 238 Ga. 698 (234 SE2d 918) (1976)
2. Morgan v. State, 241 Ga. 485 (246 SE2d 198) (1978)
3. Westbrook v. State, 242 Ga. 151 (249 SE2d 524) (1978)
4. Ruffin v. State, 243 Ga. 95 (252 SE2d 472) (1979)
5. Hardy v. State, 245 Ga. 272 (SE2d) (1980)
6. Dampier v. State, 245 Ga. 427 (SE2d) (1980)

D
Hill

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR.,

Appellant,

v.

THE STATE,

Appellee.

CASE NO. 35987

BRIEF OF THE APPELLANT

KENNETH J. VANDERHOFF, JR., Attorney for Appellant
P. O. Box 738
Cumming, Georgia 30130

FRANK MILLS, III, Attorney for Appellee
P. O. Box 428
Canton, Georgia 30114

ARTHUR K. BOLTON, Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Respondent's Appendix B

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR.	*	
Appellant,	*	CASE NO. 35987
v.	*	BRIEF OF THE APPELLANT
THE STATE,	*	
Appellee,	*	

PART ONE

A. Statement of the Case.

The appellant, JOSEPH WILSON, JR., was convicted of the murder of George A. Knox. The appellant was also convicted of kidnapping with bodily injury and possession of a firearm during the commission of a crime.

The prosecution presented three main witnesses, Patty Johnson, David Burns, and Kenneth Burns. These witnesses testified that they were present at the home of Patty Johnson when the appellant took the victim from the home at the point of a sawed-off shotgun.

There was testimony that each of these witnesses had been drinking either at the home of Patty Johnson or earlier in the evening, and at a close proximity to the time they allegedly saw Joey Wilson.

Patty Johnson, David Burns, and Kenneth Burns each gave sworn, pre-trial statements which were transcribed by a court reporter. Each one of them gave a statement on February 27,

1979. On March 2, 1979, Patty Johnson gave another sworn statement "to clear up some gaps in her testimony." Reading the two statements of Patty Johnson and the statements of the Burns brothers, there are inconsistencies and conflicts. It was important for the defense to have copies of these sworn statements to test the credibility of the State's witnesses because it was their testimonies which established the State's case. Defendant's attorneys were allowed to read the statements and make notes but they were not given copies, when copies were readily available. The court did not give the defense copies of the statements because the State didn't want the defendant's attorneys "nit-picking" every detail of their case.

The defense filed a Brady motion and two Notices to Produce, which were aimed at obtaining copies of the statements prior to trial. The second Notice to Produce was specific and outlined that the statements were material to defendant's case. The defendant has never received complete use of these statements but during the trial, a matter came up which was impeaching, and defendants were allowed to see a copy of this statement. The defendants were never given complete use of these statements and because of this they were not allowed to cross-examine the State's witnesses in detail about their prior, transcribed statements.

The defendant, through his attorneys, further requested that all evidence reviewed in the in camera inspection be made a part of the record for appellate review. This request was

denied over objection of the defendant.

The inconsistent statements of the State's three main witnesses, their different descriptions of the sawed-off shotgun, and the fact that each witness was under the influence of alcohol to a degree, were facts which should have affected the credibility of the State's three main witnesses. Sgt. J. C. Adams was allowed to testify to the detailed conversations with witnesses while investigating the alleged crime. These conversations tended to bolster the credibility of the State's three main witnesses, as it could only confirm what they allegedly saw. Over objection, the statements were allowed into evidence to show the conduct of the investigating officer. The defendant argues that it was error to go one step further, and allow Sgt. Adams to testify and relate the exact communications that he had while investigating the crime.

After the trial, the defendant was convicted of the offense of murder, kidnapping with bodily harm, and possession of a firearm during a felony from which verdict and judgment he now appeals. Defendant received the sentence of death for the offense of murder, the sentence of life imprisonment for the offense of kidnapping, and the sentence of five years imprisonment for the offense of possession of a firearm during commission of a felony.

B. Questions Presented.

The questions presented are as follows:

1. Did the trial court err by failing to insure at the request of the defendant that the papers examined by it in camera be made a part of the record for appellate review with the Brady procedure?

2. Was the defendant's right to a thorough and sifting cross-examination abridged when the State failed to provide the defendant with copies of the written statements?

3. Was it error for the court to allow Sgt. J. C. Adams to testify as to out-of-court conversations with witnesses?

PART TWO

Enumeration of Errors

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR., *

Appellant, *

v. * CASE NO. 35987

THE STATE, *

Appellee. *

ENUMERATION OF ERRORS

Comes now the Appellant and file this his Enumeration of Errors as follows:

I.

The trial court erred by failing to order the State's files to be made a part of the record for appellate review of his rights under Brady.

II.

The trial court erred in failing to rule the statements of Patty Johnson, David Burns, and Kenneth Burns were exculpatory and the court further erred in failing to order that the attorneys for the defendant be provided with copies of the pre-trial, transcribed, statements of Patty Johnson, David Burns, and Kenneth Burns, pursuant to their Notice to Produce.

III.

The trial court erred in allowing Sgt. J. C. Adams to testify as to the out-of-court conversations that he had with witnesses.

This Court, rather than the Court of Appeals, has jurisdiction of this case for the reason that the defendant was convicted of a capital felony requiring review by the Supreme Court under the provisions of the Constitution of the State of Georgia, Article VI, Section 2, Paragraph IV, Georgia Code Ann. Section 2-3104 (Rev. 1977).

This 29th day of February, 1980.

s/
KENNETH J. VANDERHOFF, JR.
Counsel for Appellant

s/
LYNWOOD D. JORDAN, JR.
Counsel for Appellant

PART THREE - ARGUMENT AND CITATION

I.

THE TRIAL COURT ERRED BY FAILING TO ORDER THE STATE'S FILES TO BE MADE A PART OF THE RECORD FOR APPELLATE REVIEW OF HIS RIGHTS UNDER BRADY.

If the defendant wishes to contest the findings of the judge pursuant to the in camera inspection, the burden is on him to show that the judge's determinations were erroneous. Watts v. State, 239 Ga. 725.

The defendant cannot do this case because he has no record. He has a right to appeal but no means to assert it. This is a denial of due process. Without the presence of the documents reviewed by the trial court in camera, no check exists on any abuse of a defendant's right to favorable or exculpatory material.

The court stated in pre-trial motions as follows: "The only statement that I read was that of Mrs. Patty Johnson." (T-12, L-12) The District Attorney's file should have contained transcribed, pre-trial, statements of three witnesses: Mrs. Patty Johnson, David Burns, and Kenneth Burns. Whether or not the court received the statements of David Burns and Kenneth Burns cannot be substantiated because there is no record of the State's file. This is a prime example as to why the State's file should be made a part of the record.

II.

THE COURT ERRED IN FAILING TO PROVIDE DEFENDANT WITH A COPY OF THE TRANSCRIBED, PRE-TRIAL, STATEMENTS OF THE STATE'S THREE MAIN WITNESSES, PATTY JOHNSON, DAVID BURNS, AND KENNETH BURNS.

The defendant through his attorney filed a Notice to Produce which was heard on June 14, 1979, by the trial judge. This hearing was transcribed and this Notice to Produce and a subsequent Notice to Produce, which was filed on July 27, 1979, were specific and indicated the materiality and favorable nature of the statements requested. Defendant's request was in accordance with the specificasity outlined in Stevens v. State, 242 Ga. 34, 1978. In the court's order, dated July 23, 1979, the court ordered that the statements of Patty Johnson, David Burns, and Kenneth Burns be submitted to the court for purposes of undergoing "in camera" inspection and if the court finds them exculpatory or otherwise favorable then copies will be provided to counsel for the defendant.

The day of the trial, the court informed the attorneys for the defendant that "the court didn't find anything exculpatory so far as the defendant is concerned, that you wouldn't already know by seeing the statements themselves." (T-12, L-5).

The court stated that "The only statement that I read is that of Mrs. Patty Johnson." (T-12, L-12). The record shows that Patty Johnson made two pre-trial, sworn, transcribed statements and each of the Burns brothers made a statement.

Therefore, there was no determination if the statements were exculpable to the defendant, if the court only read one statement of Patty Johnson. Since the evidence reviewed in the in camera inspection was not placed in the records for appellate review then this fact remains unanswered.

A notice to produce under Georgia Code Ann. Section 38-801(g)(Rev. 1974), is available to an accused in a criminal trial by virtue of the provisions of Georgia Code Ann. Section 38-802 (Rev. 1974). Those code provisions mandate production upon notice at trial of a criminal case. Brown v. The State, 238 Ga. 98 (Rev. 1976).

The court failed to turn over copies prior to trial but it did provide the defendant with a copy once the court became aware of any testimony that was contradictory to the pre-trial statements. Prior to trial the defendant repeatedly requested the complete use of copies of the pre-trial statements. The court denied the defendant copies of the statements and stated "that the reason for it, of course, is that the State don't want nit-picking of every word they might have used." (T-18, L-19).

The fact that the State doesn't want nit-picking is a conjectural subversion of the trial court's function. It is the function of the trial court to control abuses of witnesses by the defense at the time of the trial, and it is not the function of the State or the court to attempt to do this prior to trial, and certainly not when the statements were subject to

a specific Notice to Produce.

Although the defendant's attorneys were allowed to read the statements and make notes, the denial of the copies, when copies were readily available, denies the defendant of the complete use of favorable evidence which would discredit Patty Johnson's, Kenneth Burns', and David Burns' testimony.

The denial of the statement prevented the defendant from conducting a thorough and sifting cross-examination of the State's three witnesses. It further prevented the defendant from properly attempting to discredit the testimony of the State's witnesses. Therefore, it was error for the court not to provide the defendant with the pre-trial statements of these three witnesses. The discrepancies in the three pre-trial statements by the three eye-witnesses to the alleged kidnapping should have been enough alone to allow the court to declare them exculpatory and favorable, and, therefore, tender a copy to the defendant's attorneys. Defendant further urges that the State's reason for objecting to the defendant having copies of these pre-trial statements which were supposedly to prevent nit-picking, suggests that these statements, were, at the least, arguably favorable to the defendant's defense.

Therefore, the court erred in not providing defendant with a copy of the three statements which were specifically requested in the Notice to Produce, and the court subsequently erred by not determining that the statements were exculpatory and materially favorable to the defendant, and failing to

provide the defendant with a copy pursuant to its order of July 23, 1979.

III.

THE TRIAL COURT ERRED IN ALLOWING SGT. J. C. ADAMS TO TESTIFY AS TO OUT-OF-COURT CONVERSATIONS THAT HE HAD WITH WITNESSES.

An objection to the investigator's out-of-court conversations was made and this objection was overruled because the State's counsel stated that conversations were offered for the limited purpose of showing the officer's conduct. (T-440, L-10).

The basis of defendant's objection is that testimony was not offered to show the officer's conduct in conducting his investigation and if it was attempted to be offered to show conduct, the State went one step more as this testimony was prejudicial to the defendant.

The District Attorney propounded the question to the investigator which was as follows: "All right. Now I am going to get back to what they exactly told you concerning what Joey said later. Right now I want to ask you if, as a result of the information, what did you then do?" (T-441, L-19).

Sgt. J. C. Adams answered as follows: "This led me back to Patty Johnson's place."

Georgia Code Annotated 38-203, admits testimony of investigating officer concerning his conversations with witnesses

for the limited purpose of explaining conduct. Defendant argues that after J. C. Adams stated that "This led me back to Patty Johnson's place" then his conduct was already explained. Defendant contends that for the State to go further and ask the question, "How do you determine that or why did you go back to Patty Johnson's after talking with these people" was prejudicial to the defendant. The testimony had already explained the officer's conduct and the State had already explained the end result which was returning to the home of Patty Johnson. For the State's attorney to prompt a more specific and detailed answer from Sgt. Adams by liciting the following testimony: "The fact had arose that Joey Wilson had been at this location during the evening hours at some period of time on Friday. He had stated that he already contacted Patty; that Joey had been there earlier, so, with this information I went back to see Patty with the assumption that George had probably been at Patty Johnson's. That he had been there either later or on in the evening hours, or there at a later time than what she had told me." was prejudicial to the defendant.

The State's only purpose was to put before the jury the exact words of an out-of-court declarance.

Although the better practice is to bring out the fact of the conversation without relating the exact words used, where details are given there is no reversible error unless the words are prejudicial. Arnold v. State, 236 Ga. 534, 1976.

This question and answer as stated above, does not fall under the objection to the hearsay rule and the specificasity of the investigator and the details are prejudicial to the defendant.

CONCLUSION

For these reasons, the appellant respectfully requests this Court to reverse his conviction for the offense of murder, kidnapping with bodily harm, and possession of a firearm.

This 29th day of February, 1980.

s/
KENNETH J. VANDERHOFF, JR.
Attorney for Appellant

VANDERHOFF & JORDAN
P. O. Box 738
Cumming, Georgia 30130
(404) 887-1445

This is to certify that I, Kenneth J. Vanderhoff, Jr., attorney for the Appellant, have this day served Frank Mills, III, attorney for Appellee, and Attorney General Arthur K. Bolton, with a copy of the foregoing Enumeration of Errors, by depositing a copy thereof in the United States Mail addressed to the former at P. O. Box 428, Canton, Georgia 30114, and the latter at 132 State Judicial Building, Atlanta, Georgia 30334.

This 5 day of March, 1980.

s/
KENNETH J. VANDERHOFF, JR.

IN THE SUPREME COURT OF GEORGIA

JOSEPH (JOEY) WILSON, JR.	*	
	*	CASE NO. 35987
Appellant,	*	
	*	ON APPEAL FROM THE SUPERIOR
v.	*	COURT OF FORSYTH COUNTY
	*	
STATE OF GEORGIA	*	MURDER, KIDNAPPING WITH BODILY
	*	INJURY, POSSESSION OF A FIRE-
Appellee.	*	ARM DURING COMMISSION OF A CRIME
	*	

SUPPLEMENTAL BRIEF ON BEHALF OF THE APPELLANT

VANDERHOFF & JORDAN
Attorneys for Appellant
P. O. Box 738
Cumming, Georgia 30130

IN THE SUPREME COURT OF GEORGIA

JOSEPH (JOEY) WILSON, JR.	*	CASE NO. 35987
Appellant,	*	ON APPEAL FROM THE SUPERIOR COURT OF FORSYTH COUNTY
v.	*	
STATE OF GEORGIA,	*	MURDER, KIDNAPPING WITH BODILY INJURY, POSSESSION OF A FIREARM DURING COMMISSION OF A CRIME
Appellee.	*	

I. INTRODUCTION

So often an appellant in a criminal case is tempted to list enumeration after enumeration hoping to snag something somewhere irrespective of the real merits of each separate claim.

The appellant has not chosen to burden the Court, and its clerks, with that approach in this case.

The appellant must, however, file this supplemental brief as authorized by Georgia Code Ann., Section 24-4541 (Supp. 1979), to augment his argument and his enumerations of errors which are a part of the brief, Ga. Code Ann., Section 24-4539 (Supp. 1979). Appellant adds the following sub-parts to Enumeration I and re-states his enumerations of errors.

II. SUPPLEMENTAL ENUMERATIONS OF ERRORS

IN THE SUPREME COURT OF GEORGIA

JOSEPH WILSON, JR.,	*	CASE NO. 35987
Appellant,	*	
v.	*	
THE STATE,	*	
Appellee.	*	

SUPPLEMENTAL ENUMERATIONS OF ERRORS

Comes now the appellant and files this his Enumerations of Errors as follows:

I.

The trial court erred by failing to make any record whatever of the in camera inspection:

(a) By failing to deposit copies or originals of the documents examined by the court into the registry of the court as part of the record, a patent refusal to make a record, the appellant is precluded from securing appellate review of the trial court's discretionary action with regard to the in camera inspection.

(b) The trial court erred in failing to make any record whatever of the in camera inspection.

(c) The trial court erred by insuring impossibility of appellate court review of the in camera inspection in violation of

the due process requirements of the Georgia Constitution and the Constitution for the United States.

(d) Georgia statutory law requires a record of all proceedings to be made in a criminal prosecution and failure of the trial court to so make a record violates the due process requirements of the Georgia Constitution and the Constitution for the United States of America.

(e) The failure of the trial court to have an inventory of the documents examined at the in camera inspection made pursuant to its own written order was error and precludes the defendant from any supplementary action whatever with regard to the record in violation of the due process requirements of the Georgia Constitution and the Constitution for the United States of America.

(f) The trial court abused its discretion in failing to provide the defendant with favorable material discovered in the in camera inspection.

(g) Favorable material existed in the files examined by the court during the in camera inspection which the trial court failed to supply to the defendant, which was error.

II.

The trial court erred in failing to rule the statements of Patty Johnson, David Burns, and Kenneth Burns were exculpatory and the court further erred in failing to order that the attorneys for the defendant be provided with copies of the pre-trial,

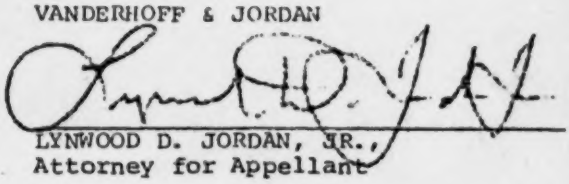
transcribed, statements of Patty Johnson, David Burns, and Kenneth Burns, pursuant to their Notice to Produce.

III.

The trial court erred in allowing Sgt. J. C. Adams to testify as to the out-of-court conversations which he had with witnesses.

Respectfully submitted, this 10th day of April, 1980.

VANDERHOFF & JORDAN



LYNWOOD D. JORDAN, JR.,
Attorney for Appellant

III. SUPPLEMENTAL STATEMENT OF FACTS

By happenstance, appellant's counsel received this week the March issue of The American Bar Association Journal containing an article on the British judicial system. Part of it is pertinent:

> "There are no briefs on appeal, and there is no transcript of testimony, although the questions and answers were recorded by a shorthand writer. The appellate judges would not have the vaguest idea of what the case involved until they heard Shindler's oral explanation. Knowing, however, that one of them must give a decision at the close of the oral argument, they all would be most attentive. The second half hour would be more like a seminar or a decision-making conference with the lawyers participating. There is a constant colloquy among the judges and barristers, and if a question of law arises, books are taken from the shelves that line the courtroom and passages are read, discussed, and distinguished openly. After listening to this, a visitor can almost always guess the decision.
>
> In a completely oral system, in which the judges depend on counsels' presentations, the barristers' duty not to deceive the court is taken very, very seriously. At an earlier session in the Criminal Division, I had heard the chief judge interrupt a lady barrister who in her argument slanted the facts in her client's favor, as is so commonplace in our courts. The judge broke in and proclaimed, 'You lie to me.' This was a most unusual happening in such a decorus climate, but it did happen, and I have no doubt that that Portia will never attempt again to bend the truth.
>
> After this appellate conference is over, usually without recess, one of the judges gives a reasoned oral decision, setting out the facts, what the lower court did, the law, and the reason for its decision."

A.B.A.J., March, 1980, at 334.

That is the spirit with which the appellant presents this his supplemental arguments. The facts will not be "slanted."

Underlying policy considerations should be always in the minds of members of the bar when examining the very nature of appellate review--and that is the crux of this case.

> "Justice demands an independent and objective assessment of a district judge's appraisal of his own conduct of a criminal trial." Coppedge v. United States, 369 U.S. 438, 455-56 (1962) (Stewart, J., concurring).

> "The principal reason for having appellate courts is to provide an opportunity for several minds to check the trial decisions made by one mind." ABA Section of Judicial Administration, Report on Internal Operating Procedures of Appellate Courts 14 (1961).

> "Nobody contends, and I would not do so either, that the legal system would be better served if all courts of original jurisdiction had final competence to decide all cases. The possibilities of error, oversight, arbitrariness and even venality in any human institution are such that subjecting decisions to review of some kind answers a felt need: it would simply go against the grain, today, to make a matter as sensitive as a criminal conviction subject to unchecked determination by a single institution." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441,453 (1963).

Those principles and policy considerations underpin appellant's written arguments below.

The appellant could argue irrelevant matter as does the State. Appellant believes the court will agree that a fair paraphrase of the State's brief would be "look at all the things we graciously did for this defendant which we did not have to do. Now please overlook anything we should have done, but did not." (DA, 15).

The admonition in the American Bar Association Journal article should apply where the State has slanted (or ignored) the clear record.

> "Appellant through all the proceedings never actually requested the State's file be made a part of the record on appeal." (DA, 14).
>
> "Additionally, an examination of the record in this case reveals the absence of any request by the Defendant that the file be made a part of the record." (AG, 14).

("DA" refers to the District Attorney's brief, and "AG" refers to the Attorney General's brief).

The defendant made a specific request and motion for copies of the documents examined by the court in camera.

> "...the problem that I have with these encameron(sic) inspections is there being nothing on the record as to the result of them as far as the court reporter is concerned, and no copies of anything inspected which could be used for appellate purposes for review...But I would like, or I would request, and move the Court that some report on the record be made of this encameron(sic) inspection, and that either(sic) a copy be made and put in the registry of the Court away from our eyes so we don't get any knowledge we are not supposed to have, so that we can have an appellate review if it becomes necessary." (Hearing Transcript, June 14, 1979, pages 31 and 32). (Emphasis supplied)

The State understood that request.

> "...he hasn't really specifically asked the Court for an inventory or a copy to be made of everything in the State's file that was submitted for the encameron(sic) inspection. But, I assume that is generally what he is hitting at, and I don't know exactly what he refers to and I don't have any objection to the Court making that record." (Hearing Transcript, June 14, 1979, page 32). (Emphasis supplied)

The court understood the request. "some record is what he is talking about." (Hearing Transcript, June 14, 1979, page 32).

The court and the State, at the hearing, obviously also agreed to make an inventory. (Hearing Transcript, June 14, 1979, page 33).

At the next hearing in this case, when the prosecution became ready to turn the file over to the court for an in camera inspection, the court clearly stated, "We want to have an inventory of it also of what you do turn over to me." (Hearing Transcript, June 29, 1979, page 3).

After considerable verbiage, the State finally answered the court's question about the inventory.

> "In answering the Court's question as to what would be made available to the Court for in camera inspection, this would essentially consist of my file and the case file of Sgt. Adams...
>
> * * *
>
> "What we would suggest is rather that an inventory which would be quite involved, inasmuch as this is a death penalty case and this is one of the earliest in camera inspections we have ever had, and obviously an in camera inspection is a continuing motion. What we would request is that if the Court could, rather than trying to initial every page, but if the Court could initial what appears to be every separate exhibit..." (Hearing Transcript, June 29, 1979, pages 6 and 7).

The State admitted that the files were "involved."

The Court asked the defendant about merely initialing every document, and the defendant/appellant made it clear that he wished a record to be made of the items examined. (Motion Transcript, June 29, 1979, pages 8 and 9).

Thereafter, without further hearing, the court published an order dated July 23, 1979, wherein it was stated that no inventory would be undertaken and in lieu thereof, the court would initial each exhibit submitted to the court which would include both the files of the District Attorney and the Forsyth County Sheriff. (R-24).

Even as late as the trial, the appellant made it clear to the court that he wished a record to be made of the in camera inspection--not a record before the in camera inspection, not a record after the in camera inspection, but a record of the in camera inspection. "We still think, to protect the defendant's rights, that an inventory should have been made in the in camera, and we want to make it clear that we haven't waived that right." (T-13). (Emphasis supplied).

The court understood the specific request and also understood that the defendant did not waive his claim. "I understand that you haven't waived that right. It would have been impossible. Like one scrap of paper with numbers on it. It just was not a file that was deserving of an inventory." (T-13).

The requests and motions of the defendant were clear.

Something is wrong when the State admits that the files being submitted to the court are "involved" and the court thereafter states that the files are not deserving of an inventory.

IV. SUPPLEMENTAL ARGUMENT

In this sequence of events, there become relevant several principles:

(a) The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Brady v. Maryland, 373 U.S. 83, S. Ct. 1194, 1196 (1963).

(b) Examination of material by a trial judge in camera pursuant to Brady is a discretionary ruling. Durham v. State, 239 Ga. 697, 700 (1977).

(c) The accused bears the burden of making a "countershowing" when attacking the trial judge's ruling on the in camera inspection. Durham v. State, supra.

(d) The law of Georgia requires that in any criminal case where a court reporter is present, "...all other proceedings which may be called in question on appeal or other post-trial procedures shall be reported...." Ga. Code Ann.,Section 6-805(d) (Rev. 1975) (Emphasis supplied).

(e) "(W)hile the 14th Amendment does not require that a state shall provide for an appellate review in criminal cases (citations omitted] it is perfectly obvious that where such an appeal is provided for, and the prisoner has had benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law...." Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 587 (1914).

(f) If a record is not made of a critical evidentiary or discretionary stage of a criminal trial, and the lack thereof calls into question a constitutional right of the defendant, a reversal is in order. Owens v. State, 233 Ga. 869 (1975).

Examination of the facts set forth above as appearing on the record, and examination of principles set forth and cited above, indicate quite clearly that the present appellant has a right to raise into question an abuse of discretion by the trial judge, that the appellant informed the court that he wished a record to be made for appellate purposes of the in camera inspection, that the law of Georgia requires a record to be made of anything which may be raised on appeal, that no record of the in camera inspection was made despite the specific requests of the appellant, that the appellant has the burden of establishing an abuse of discretion, that the appellant has absolutely nothing at his disposal with which to mount his challenge, and that, in short, the defendant is left high and dry with a right but no remedy.

The appellant made it quite clear that he was going to seek appellate review of the in camera discretionary determinations of the trial court. This was done well in advance of any in camera inspection in good faith.

This is not a case with a defective record needing correction. This is a case involving a clear refusal to make a record in the first instance.

Was it proper to refuse to make a record? The appellant asserts that it was not.

In Owens v. State, 233 Ga. 869 (1975), the defendant had been convicted in the Superior Court of Meriweather County with the death penalty being imposed. The appellant assigned error in that the trial court erred in excluding potential jurors who expressed conscientious objections to capital punishment.

The Owens court did not reach that central issue.

Resolution of the central issue in Owens was not necessary because the transcript was defective and the voir dire examination of prospective jurors on the Witherspoon criteria did not appear in the transcript.

This court in Owens held that the failure to report the Witherspoon voir dire in a case in which the sentence of death is imposed is reversible error. The Owens court recognized the requirement of Ga. Code Ann.,Section 6-805(d)(Rev. 1975), that all proceedings which may be called into question on appeal be reported. The Owens court also rejected any procedure for

supplementation of the record because post-trial examinations of lawyers and court officials is not a satisfactory method for performing the review function.

The present case differs little from Owens.

Of course, Owens can be distinguished from the instant case; however, it is a distinction without a difference.

The distinction lies in the fact that Owens dealt with a defective record on the Witherspoon right. The present case deals with a defective record on the Brady right.

Both rights are basic rights under due process requirements. Neither is "less important" than the other.

The present case also raises questions not specifically set forth in the Owens opinion regarding denial of due process to this appellant under Georgia statutory requirements.

"...all judgments, rulings or orders rendered in the case which are raised on appeal, and which may affect the proceedings below, shall be reviewed and determined by the appellate court...." Ga. Code Ann.,Section 6-701(b)(Supp. 1979) (Emphasis supplied).

"Where a trial in any civil or criminal case is reported by a court reporter, all motions, colloquies, objections, rulings, all evidence--whether admitted or stricken on objection or otherwise--copies or summaries of all documentary evidence, the charge of the court, and all other proceedings which may be called in question on appeal or other post-trial procedure shall be

reported, and where the report is transcribed, all such matters shall be included in the written transcript, it being the intention of this law that all these matters appear in the record...." Ga. Code Ann., Section 6-805(d) (Rev. 1975). (Emphasis supplied).

"...the defendant in any criminal proceeding, in the superior or city courts, may appeal from any sentence, judgment, or decision, or decree of such court, or of the judge thereof in any matter heard at chambers." (Ga. Code Ann., Section 6-901 (Rev. 1975) (Emphasis supplied).

"...it is the intention of this law to provide a new procedure for taking cases to the Supreme Court and Court of Appeals ... and, to that end, this law shall be liberally construed so as to bring about a decision on the merits of every case appealed, and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to herein." Ga. Code Ann., Section 6-905 (Rev. 1975) (Emphasis supplied).

None of these statutory mandates were followed in the present case with regard to the Brady in camera inspection and the appellant was denied due process of law under the procedural and substantive law of this forum. The statutory language is clear.

V. CONCLUSION

For these reasons, the appellant respectfully requests this Court to reverse his conviction for the offenses of murder, kidnapping with bodily harm, and possession of a firearm during commission of a crime.

This 10th day of April, 1980.

VANDERHOFF & JORDAN

LYNWOOD D. JORDAN, JR.,
Attorney for Appellant

IN THE SUPREME COURT OF GEORGIA

JOSEPH "JOEY" WILSON, JR., : CASE NO. 3645

Appellant, :

v. :

STATE OF GEORGIA, :

Appellee. : MOTION FOR REHEARING

COMES NOW the appellant and requests this court to order a rehearing of this case for the following reasons in addition to those originally presented:

I.

THE "SUPPLEMENTAL RECORD" APPARENTLY TRANSMITTED TO THIS COURT PURSUANT TO THIS COURT'S ORDER OF APRIL 17, 1980, DOES NOT CURE THE ORIGINAL DUE PROCESS DEFICIENCIES OF WHICH THE APPELLANT COMPLAINED, AND INDEED, INJECTS A FURTHER DUE PROCESS VIOLATION INTO THE CASE AND DEPRIVES THE APPELLANT OF EFFECTIVE ASSISTANCE OF COUNSEL.

On April 17, 1980, this court ordered that the trial judge transmit to it those materials which were examined in camera under certificate as to whether such file contained all of the materials examined. Appellant's counsel received a copy of that order.

Respondent's Exhibit C

On April 24, 1980, the District Attorney apparently forwarded to the trial court "the entire file as is" as evidenced by a letter to the trial court by the District Attorney dated April 24, 1980, a copy of which was served upon appellant's counsel and which is attached hereto.

A fair reading of the letter, which is the last document available to appellant's counsel, indicates that the prosecutor was unable to determine where "the dividing line" was on the appellant's case file and the files of related cases.

Appellant's counsel has received no copy of the trial judge's certificate to this court.

The appellant's counsel has received no copies of any other documents transmitted to this court.

Appellant's counsel has continually monitored the office of the clerk of the trial court and no certificate or other documents have been filed in that office to be included as part of the record to be transmitted to this court after the original hearing.

The only record knowledge available to appellant's counsel of the materials transmitted to this court for review of the in camera inspection is the indication on page 6 of this court's order of June 10, 1980, that the judge's certificate states that all materials examined in camera have been transmitted "to the best of his knowledge and belief."

Appellant asserts that the record of the in camera inspection has not been established to that

degree of specificity necessary to uphold a death sentence. May a death sentence conviction be upheld where the State itself is unable to determine where "the dividing line" is between the file submitted to the court in camera and later file documents? If the State does not know, the entity which amassed the file, certainly neither the trial court nor this court can know either.

If the "dividing line" cannot now be drawn and is admittedly "difficult to determine", how can it be "determine[d]" some 8 months later what is not in the file, i.e., what should have been disclosed but was not?

The State is simply and patently stating that it cannot now state what was in the file delivered to the trial court in camera -- nothing more, nothing less (based upon appellant's limited knowledge of the present record).

In an "abundance of caution", the State now simply dumps everything which it now has into the record.

Under the intent of the statutes cited to this court earlier by the appellant, any person before the bar of justice in this state deserves a greater degree of specificity in the record of the judicial process against him.

Appellant submits that the trial court's certification "to the best of his knowledge and belief" does not supply that certainty.

The fact of "what was examined" must be determined as part of the record required by statute with the same degree of certainty as testimony and the distinction of the Owens

case is without a difference. There is absolutely and unequivocally no difference between recreating oral testimony and recreating documentary evidence when the State cannot determine the "dividing line" and the trial court can muster nothing greater than "belief."

The manner of transmission and state of the record further violates due process requirements and also deprives the appellant of effective assistance of counsel.

Apparently, documents were certified to this court by the trial judge. There is no record of certification or copies of the certified record in the trial court. The clerk of the trial court is required to "... retain an exact duplicate copy of all records and the transcript sent up, with the same pagination, in his office as a permanent record." Ga. Code Ann., §6-808(Rev. 1975)(emphasis supplied).

No record is present in the trial court and appellant's counsel has been unable to ascertain the nature of, or contents of, documents before this court. Appellant's counsel has been unable to argue to this court error on the part of the trial court committed during the in camera inspection and has been unable to see documents examined by this court in determining the merits of appellant's appeal on this or other points. Appellant's counsel did not know on the record that any further documents were before this court until receipt of this court's order of June 10, 1980.

For these reasons, appellant respectfully submits that the original due process deficiencies in the record have

not been cured, that additional due process deficiencies have been injected into the record, and that the appellant has been denied effective assistance of counsel in presenting his case to this court.

II.

THE COURT'S DETERMINATION IN THE "SENTENCE REVIEW" THAT THE DEATH PENALTY WAS PROPERLY IMPOSED WITH REGARD TO THE STATUTORY AGGRAVATING CIRCUMSTANCE OF COMMISSION OF KIDNAPPING WITH BODILY INJURY SHOULD BE RECONSIDERED AND THE DEATH PENALTY SHOULD BE VACATED.

The allowance of the death penalty for the charge of "murder" where the jury finds that the offender was engaged in the capitol felony of "kidnapping with bodily injury" lacks objectivity.

Under the definition of "kidnapping" as it pertains to the State of Georgia, if anyone causes a person to move any distance against his will, the crime of "kidnapping" is committed. The distance is not material.

Under such a definition, very few murders would not involve the crime of kidnapping with bodily injury. Only an "ambush" slaying would not qualify for a statutorily aggravated murder.

If any person pointed a gun at another and forced the

second person to move into another room, from behind a store counter, to step out of his car, to turn around, to take any other action with regard to movement, then and in that event, the death penalty would be warranted.

The Georgia death penalty statute, Ga. Code Ann., §27-2534.1(b)(2)(Rev. 1978), is a "bootstrap" statute which turns in upon itself and allows imposition of the death penalty in just about all cases except ambush slayings.

The precise issue has been skirted in this state in the face of substantial persuasive authority by statements such as "[w]hether or not such a rule is also the law of this State, it is not necessary to decide in the present case as the evidence does not disclose that any other crime was involved, or that the asportation here was incidental to the commission of another crime shown by the evidence." See, Brown v. State, 132 Ga. App. 399, 208 S.E.2d 183 (1974), and cases cited therein. Brown held that movement of 15 feet was kidnapping.

It is now necessary to decide whether such is the law of this state. The evidence allegedly does disclose that "any other crime" was involved. The other crime, murder, involves imposition of the death penalty. The kidnapping here was also only "incidental to the commission of the crime of murder as shown by the evidence.

To allow the State to use the movement of an individual "15 feet," or more (15 miles), or less (how less?), as the basis for death penalty imposition when such movement was part and parcel of the crime of murder does not justifiably delineate those instanc

in which the death penalty is proper.

Under Georgia law, only the ambush murderer who does not control the movement of his victum to any degree whatsoever is free from the death penalty under the "kidnapping" aggravating circumstance.

If the legislature intended to save the victim of an abortive ransom kidnapping from death upon collapse of the scheme, this it did not do and the statute is not so limited. This court now has the opportunity to properly so limit it.

For these reasons, appellant requests this court to reconsider its affirmance of the death penalty under the sentence review.

This 18th day of June, 1980.

VANDERHOFF & JORDAN

LYNWOOD D. JORDAN, JR.
Attorney for Appellant

District Attorney

OF THE

Blue Ridge Judicial Circuit

FRANK C. MILLS, III
District Attorney

ASSISTANTS:
Rafe Banks, III
George W. Weaver
Paul Carden

April 24, 1980

Please Reply To:
P. O. Box 428
Canton, Georgia 30114
Tel. No. 479-1488

Judge Marion T. Pope, Jr.
Cherokee County Courthouse
Canton, Georgia 30114

Dear Judge Pope:

Enclosed herewith are the entire District Attorney's file and the Forsyth County Investigator's file as they now exist together with affidavits to that effect pursuant to the Order of the Supreme Court dated April 17, 1980. I have enclosed the entire file rather than merely that which was submitted for in-camera inspection, as the only way of guaging whether or not there was suppression of evidence by the prosecution is by letting the Supreme Court see the entire file as is.

As you are aware from the Motion for New Trial and otherwise the Forsyth County investigator is continuing to follow up leads which were obtained from the defendant only at trial. In addition there are cases which were made against defense witnesses Joanna Lynn (Jody) Wilson and Joseph G. Wilson, Sr. for PERJURY and against other individuals for ESCAPE all related to the defendant Joseph "Joey" Wilson, Jr. Therefore there have been a great number of additions to the "file", inasmuch as it is difficult to determine (and out of an abundance of caution I will not determine) where the dividing line is between this case file and the files of related cases.

These files are the originals and for the most part there are no copies.

If you have any questions do not hesitate to call me.

Yours truly,

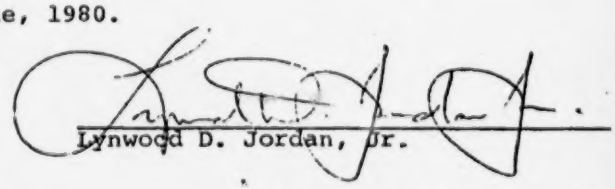
Frank C. Mills, III

FCM:jm
Enclosures
P.S. This obviously does not include the Trial Transcript

CERTIFICATE OF SERVICE

This is to certify that I, Lynwood D. Jordan, Jr., attorney for Appellant, have this day served Frank Mills, III, attorney for Appellee, with a copy of MOTION FOR REHEARING, dated June 18, 1980, by mailing a copy thereof to Frank Mills, III, District Attorney, P. O. Box 428, Canton, Georgia 30114 by depositing same in the United States Mail with adequate postage affixed thereto; and, I have this day served a copy of the MOTION FOR REHEARING, dated June 18, 1980, upon the Attorney General of the State of Georgia by mailing a copy thereof to William B. Hill, Jr., 132 State Judicial Building, 40 Capitol Square, S.W., Atlanta, Georgia 30334 by depositing same in the United States Mail with adequate postage affixed thereto.

This 18th day of June, 1980.



Lynwood D. Jordan, Jr.

VANDERHOFF & JORDAN
P. O. Box 738
Cumming, Georgia 30130
(404) 887-1445